Supreme Court, U.S.
FILED
05-1605 JUN 15 2006
OFFICE OF THE CLERK

No. 0

In The Supreme Court of the United States

RIAZ BAQIR, M.D.,

Petitioner,

v.

ANTHONY J. PRINCIPI, Secretary, Department of Veterans Affairs,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

April Burt Sutton
Counsel of Record
John R. Sutton, Jr.
THE SUTTON FIRM P.A.
Post Office Box 145
Candler, North Carolina 28715
(828) 667-5476

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street, NW • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

Whether a hospital employer's assertion of incompetence as its nondiscriminatory reason for termination of an interventional cardiologist should automatically defeat the terminated physician's prima facie case of employment discrimination at summary judgment?

PARTIES TO THE PROCEEDING

Petitioner is Dr. Riaz, Baqir, M.D., (hereinafter "Dr. Baqir") who was the plaintiff in the District Court of Western North Carolina and appellant in the Fourth Circuit Court of Appeals.

Respondent is Anthony J. Principi, Secretary of the Department of Veterans Affairs (hereinafter "VA"), who was the defendant in the District Court Western North Carolina and appellee in the Fourth Circuit Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 10

I. THE DECISION OF THE FOURTH CIRCUIT BELOW SHOULD BE REVERSED ON THE BASIS THAT IT IS INCONSISTENT WITH THE *MCDONNELL - DOUGLAS* ANALYSIS ESTABLISHED BY THIS COURT AND IT CONFLICTS WITH THE SIXTH CIRCUIT'S HOLDING IN *CLINE V. CATHOLIC DIOCESE OF TOLEDO* 11

II. HOSPITAL EMPLOYERS CHARGED WITH EMPLOYMENT DISCRIMINATION ARE NOT EXEMPT FROM CIVIL LIABILITY OR JUDICIAL INQUIRY BY CLAIMING THAT THE DISCHARGED EMPLOYEE WAS INCOMPETENT.....15

CONCLUSION.....18

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Baqir v. Principi,
434 F.3d 733 (2006).....1

Benjamin v. Schuller,
400 F. Supp. 2d 1055 (S.D. Ohio 2005).....16

Betts v. Rector and Visitors of the University of Virginia,
939 F. Supp. 461 (W.D. Va. 1996).....16

Cline v. Catholic Diocese of Toledo,
206 F.3d 651 (6th Cir. 2000).....*passim*

Freilich v. Upper Chesapeake Health, Inc.,
313 F.3d 205 (4th Cir. 2002).....16

Furnco Construction Corporation v. Waters,
438 U.S. 567, 98 S. Ct. 2943 (1978).....13, 14

Jane v. The Bowman Gray School of Medicine-North Carolina Baptist Hospital, et al,
211 F. Supp. 678 (M.D.N.C. 2002).....16

McDonnell Douglas Corporation v. Green,
411 U.S. 792, 93 S. Ct. 1817 (1973).....*passim*

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133, 120 S. Ct. 2097 (2000).....11

Texas Department of Community Affairs v. Burdine, 50 U.S. 248, 101 S. Ct. 1089 (1981).....11

United States Postal Service Board of Governors v. Aikens, 60 U.S. 711, 103 S. Ct. 1478 (1983).....14

University of Pennsylvania v. EEOC, 93 U.S. 182, 110 S. Ct. 577 (1990).....17

Virmani v. Novant Health Incorporated, et al, 59 F.3d 284 (2001).....17

STATUTES

28 U.S.C. § 1254.....1-2

28 U.S.C. § 1331.....4, 10

29 U.S.C. §623.....5, 10

42 U.S.C. § 2000e-5(f)(3).....3, 9-10

42 U.S.C. § 2000e-16(a).....4

RULES

FED. R. CIV. P. 56.....5, 8, 15

Sup. Ct. R. 10.....2

Sup. Ct. R. 10(a).....1, 2

Sup. Ct. R. 10(b).....2

Sup. Ct. R 0(c) 1, 3

OPINIONS BELOW

The January 20, 2006 opinion of the United States Court of Appeals for the Fourth Circuit is annexed hereto and reported at *Baqir v. Principi*, 434 F.3d 733 (2006). App. 1. The Court of Appeals affirmed the decision of the District Court for the Western District of North Carolina, entered on 3 September 2004, in which it granted the VA's motion for summary judgment. App. 44.

JURISDICTION

The Fourth Circuit Court of Appeals issued its decision in a published opinion on January 20, 2006. App. 1. Dr. Baqir timely filed his Petition for Rehearing En Banc, and the Fourth Circuit Court of Appeals denied same on March 20, 2006. App. 70. This petition is timely filed within ninety days following the denial of the petition for rehearing en banc. Jurisdiction in this Court is based upon 28 U.S.C. 1254 and Rules 10(a) and 10(c) of the Rules of the Supreme Court of the United States.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1254: Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Supreme Court Rule 10: Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

42 U.S.C. § 2000e-5(f)(3): Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

* * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the

employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. § 2000e-16(a): Discriminatory practices prohibited; employees or applicants for employment subject to coverage:

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

28 U.S.C. § 1331: Federal question:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

29 U.S.C. § 623(a): Employer practices: It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

Federal Rule Civil Procedure 56: Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On July 19, 1999, Dr. Baqir began employment as interventional cardiologist with the Respondent VA Medical Center in Asheville, North Carolina. App. 6. Dr. Baqir's race is black; he practices the Muslim religion; and his national origin is Pakistani. App. 3. At the time he was hired by the Asheville VA, he was 52 years old. App. 4. Prior to accepting employment with the VA, Dr. Baqir had been practicing medicine for nearly thirty

years, and had been a cardiologist for ten years. App. 3. During the year immediately preceeding his employment with the VA, Dr. Baqir had successfully completed a fellowship in interventional cardiology, and was recommended for the interventional cardiologist position by his former employers and fellowship supervisors. App. 3, 4. The combination of Dr. Baqir's highly specialized training and experience left him well-qualified for the position of interventional cardiologist with the VA. App. 22.

Although Dr. Baqir was originally recruited by Dr. Peter McKeown, Chief of Surgery for the Asheville VA, by the time Dr. Baqir started employment, Dr. McKeown had departed the VA, and Dr. Baqir was assigned to report to Dr. Lewis Elliston, Chief of Medicine. App. 4-7. Dr. Elliston did not approve of Dr. Baqir's appointment as an interventional cardiologist on the basis of Dr. Baqir's age, and actually stated that interventional cardiology is "a young man's sport." App. 14. Dr. Elliston and the VA hospital board thereafter assigned Dr. Sundeep Mediratta to proctor Dr. Baqir. App. 7. Dr. Mediratta was nearly twenty years younger than Dr. Baqir and did not possess the interventional cardiology skills acquired by Dr. Baqir. App. 7. Moreover, Dr. Mediratta was of Indian descent and practiced the Hindu religion. App. 7. Significantly, although prior to Dr. Baqir's employment with the VA the two had never met personally, there had been a longstanding discord between Muslims of Pakistani descent and Hindus of Indian descent. App. 23.

Dr. Baqir first personally met Dr. Mediratta on July 22, 1999 at which time they were to perform a cardiac catheterization procedure together. App. 8. Dr. Mediratta immediately became hostile toward Dr. Baqir, refused to complete the procedure, and then proceeded to set in motion the chain of events leading to Dr. Baqir's competency being discredited. App. 8. In particular, Dr. Mediratta sought out Dr. Elliston, Chief of Staff, and claimed Dr. Baqir showed a lack of confidence in his procedure and did not complete the procedure properly (despite the fact that it was Dr. Mediratta who left the procedure). App. 8. From this communication, Dr. Elliston and Dr. Mediratta decided[1] to limit Dr. Baqir's access to the facilities. App. 8. Dr. Elliston then recommended that Dr. Baqir be sent to another VA facility in Durham, North Carolina for observation.[2] App. 7. Dr. Elliston's recommendation was

---

[1] There is a dispute in the evidence as to the VA's true decisionmaker, which was resolved in favor of the VA. The VA claims that the final authority on employment decisions was the Medical Center Director, James Christian, a non-physician. App. 4. However, because Mr. Christian was not a doctor, his authority absolutely depended on the assessments and recommendations made by Drs. Elliston and Mediratta. App. 14.

[2] There is also a dispute between the parties as to the timing of the decision to send Dr. Baqir to Durham. The VA proffered minutes dated July 15, 1999 to show that the decision to send Dr. Baqir pre-dated his employment, but these minutes were signed by Dr. Arnold Brown, who did not even attend the meeting, nor begin work with the VA until after July 26, 1999. App. 9. The courts below refused to consider this discrepancy in a light most favorable to Dr. Baqir, contrary to Rule 56, FED. R. CIV. P.

purportedly bolstered by the alleged revelation of an incomplete, unsigned peer appraisal report from 1996, which was three years prior to Dr. Baqir's employment at the VA, and two years prior to Dr. Baqir's acceptance into the interventional cardiology fellowship program. App. 5.

Dr. Baqir was supposed to have been proctored for a minimum period of ninety days. App. 9. The proctoring doctors in Durham were discouraged from rendering a favorable report of Dr. Baqir under the threat of having to travel four hours back to the Asheville VA for "further evaluation." App. 10. Not surprisingly, Dr. Baqir's proctorship period was severely limited to approximately 18 days, and the proctors in Durham yielded reports consistent with the assessment communicated by Drs. Mediratta and Elliston. App. 10.

After having organized documentation regarding Dr. Baqir, and after Dr. Baqir requested a copy of his personnel file, the VA hospital board denied Dr. Baqir privileges and subsequently terminated him on the basis of having failed to obtain privileges. App. 13, 14. To make matters worse for Dr. Baqir, the VA also reported him to the National Practitioners Data Bank. App. 13.

As a result of the VA's actions, Dr. Baqir filed suit in the United State[illegible] District Court for the Western District of North [illegible]rolina alleging, *inter alia*, employment discrimination on the basis of race, color, national origin, religion, and age. Jurisdiction of the discrimination claims based on race, color, national origin, and religion is proper under 42

U.S.C. § 2000e-5(f)(3). As to Dr. Baqir's age-based discrimination claim under 29 U.S.C. § 623, the district court had original jurisdiction pursuant to 28 U.S.C. § 1331.

The VA has defended the suit by claiming that the reason for Dr. Baqir's termination was incompetence. The VA's articulation of this defense has resulted in summary judgment in favor of the VA on the basis that Dr. Baqir failed to establish he was meeting his employer's legitimate expectations and, therefore, failed to establish a prima facie case of employment discrimination. The Fourth Circuit Court of Appeals affirmed summary judgment for the VA by concluding that the VA's self-serving assessment of Dr. Baqir's competency results in an automatic failure of Dr. Baqir's prima facie case. App. 20.

REASONS FOR GRANTING THE WRIT

The analysis of the Fourth Circuit contravenes the established burden-shifting framework announced in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) and directly conflicts with the decision of the Sixth Circuit Court of Appeals in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (2000). Moreover, in its decision, the Fourth Circuit Court of Appeals declared that assessments of competency by hospital employers charged with employment discrimination are beyond reproach. This writ should be granted (1) to resolve the conflict between the circuits and (2) to clarify the role of the judicial system in employment discrimination suits involving hospital employers

who are not exempt from engaging in illegal employment discrimination.

I. THE DECISION OF THE FOURTH CIRCUIT BELOW SHOULD BE REVERSED ON THE BASIS THAT IT IS INCONSISTENT WITH THE *MCDONNELL-DOUGLAS* ANALYSIS ESTABLISHED BY THIS COURT AND IT CONFLICTS WITH THE SIXTH CIRCUIT'S HOLDING IN *CLINE V. CATHOLIC DIOCESE OF TOLEDO*.

This Court first addressed with specificity the "order and allocation of proof" in a Title VII employment discrimination claim in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800, 93 S. Ct. 1817, 1823 (1973). The basic concept emanating from *McDonnell Douglas* was that once the complaining employee establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 802, 1824. Because the *McDonnell Douglas* case involved a refusal to hire, over the years the prima facie elements have been modified to fit the particular adverse employment action at issue. *See generally*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981)(employment discrimination based on gender); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000) (employment discrimination based on age).

In a case such as Dr. Baqir's, a prima facie case of employment discrimination in the context of termination is established by showing (1) that the employee was a member of a protected class; (2) that he suffered adverse employment action; (3) that at the time of the adverse employment action, he was qualified and meeting the employer's legitimate expectations, and (4) that subsequent to the adverse action, the job was filled by a person not of the employee's protected class. *McDonnell Douglas*, 411 U.S. at 800, 93 S. Ct. at 1823. Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the termination. *Id.* In the instant case, the articulated reason for Dr. Baqir's termination was incompetency. Without addressing the other elements of the prima facie case, both the district court and Court of Appeals decided that since the VA claimed Dr. Baqir was incompetent, Dr. Baqir could never prove he was performing his job at a level that met the VA's legitimate expectations. App. 20.

The VA's contention that Dr. Baqir was incompetent became entangled with whether Dr. Baqir made out a prima facie case of discrimination. Such was the case in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). In *Cline*, the court addressed a case wherein a teacher claimed she was terminated on the basis of gender discrimination, and her employer defended the action by claiming that since she failed to adhere to a rule prohibiting extramarital sexual relations, she was not qualified for the job. 206 F.3d at 655-657. Cline's employer moved for summary judgment based on the contention that since the rule violation

implicated her qualifications, the teacher failed to make a prima facie case for employment discrimination. *Id.* at 657.

In addressing the merits of the teacher's appeal from the district court's grant of summary judgment, the Court of Appeals in *Cline* observed,

> [i]n addition to setting a burden far too high, [the district court] conflated the distinct stages of the *McDonnell Douglas* inquiry by using [the employer]'s 'nondiscriminatory reason' as a predicate for finding Cline to have failed to make a prima facie case.

206 F.3d at 660. The *Cline* court then decided that a resolution of the "debate" about the teacher's job qualifications at the prima facie stage was improper, and that "a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff." *Id.* at 662. Like *Cline*, the lower courts in this case erred by relying on the VA's proffered "nondiscriminatory reason as a predicate for finding [Baqir]...failed to make a prima facie case." *Id.*

The purpose of allowing the employer to articulate a legitimate, nondiscriminatory reason for adverse employment action in a case such as Dr. Baqir's is simply "to dispel the adverse inference from a prima facie showing under *McDonnell Douglas...*" *-Furnco Construction Corporation v. Waters*, 438 U.S. 567, 579, 98 S. Ct. 2943, 2950

(1978). This Court has specifically denounced the idea that the employer's articulation of a nondiscriminatory reason for the adverse employment action terminates the Plaintiff's case:

> This is not to say, of course, that proof of justification which is reasonably related to the achievement of some legitimate goal necessarily ends the inquiry. **The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination.**

Id. (emphasis added)

In *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1983), this Court "reprimanded the district court for considering [the argument that the employee was not qualified] as bearing on the prima facie proof." *Aikens* at 717, 1483; *Cline* at 662. To be clear, the exact characterization of the district court's use of the employer's proffered nondiscriminatory reason for termination in the context of the prima facie case was deemed by this Court as a "mistaken view of the law." *Id.*

Despite this Court's directives, the Fourth Circuit approved of the use of the employer's articulated reason for the dismissal of Dr. Baqir from his job at the VA as a means to eviscerate Dr. Baqir's prima facie showing of illegal discrimination, which resulted in the dismissal of his case at

summary judgment. The *McDonnell Douglas* case and its progeny, including the Sixth Circuit's decision in *Cline*, certainly prohibit such a result. Accordingly, Dr. Baqir respectfully urges this Court to grant his petition to resolve the conflict of the circuits on this issue.

II. HOSPITAL EMPLOYERS CHARGED WITH EMPLOYMENT DISCRIMINATION ARE NOT EXEMPT FROM CIVIL LIABILITY OR JUDICIAL INQUIRY BY CLAIMING THAT THE DISCHARGED EMPLOYEE WAS INCOMPETENT.

The decision of the district court to grant the employer's motion for summary judgment, and the subsequent affirmation of same, amounts to a shirking of judicial responsibility to fairly determine Dr. Baqir's claims of illegal employment discrimination. Although couched in the notion that it is permissible to afford "wide discretion" to hospitals in matters of so-called hospital governance, the lower courts have opened a back door for illegal discrimination. Furthermore, the deference afforded hospitals and other medical or academic employers is likely to cause widespread misapplication of the *McDonnell Douglas* framework, as outlined above, resulting in improper grants of summary judgment to these types of employers. Contrary to Rule 56 of the Federal Rules of Civil Procedure, the employer's assertion of incompetence in the instant case has resulted in a resolution of all ambiguities and inferences in favor of the **employer**, rather than the employee. *See* FN 1 & 2, *supra.*

The failure of the lower courts to properly evaluate Dr. Baqir's case seems to be rooted in the unwarranted, self-imposed impotence of the courts to "impugn" assessments of medical competence or similar academic judgments. App. 20, *citing Freilich v. Upper Chesapeake Health, Inc.* 313 F.3d 205, 218 (4th Cir. 2002) (observing that "[h]ospitals have historically had wide discretion to make decisions regarding their medical staff" and indicating that it is improper for "courts to enmesh themselves in hospital governance"); *see also*, *Betts v. Rector and Visitors of the University of Virginia*, 939 F. Supp. 461, 469 (W.D. Va. 1996) ("plainly courts may not override an academic decision") (internal quotations and citations omitted); *Jane v. The Bowman Gray School of Medicine-North Carolina Baptist Hospital, et al*, 211 F. Supp. 678, 695-6 (M.D.N.C. 2002) (resolving the "close call" in favor of granting the employer's summary judgment motion and noting the employer's argument and authority that "it is not the Court's place to second-guess academic decisions"); *Benjamin v. Schuller*, 400 F. Supp. 2d 1055, 1083 (S.D. Ohio 2005)(distinguishing *Cline* and determining that "it is not a court's province to review the merits of the charges against a physician, and that courts generally afford great deference to the decision of the hospital's governing body concerning the granting of hospital privileges") (internal quotations and citations omitted).

However, the notion that courts are powerless to require medical employers to prove determinations of incompetence or similar academic judgments directly conflicts with the compelling governmental and social interest in eradicating

illegal employment discrimination. This Court has directed that academic freedom should not be deemed boundless, especially if there is a question as to the **legitimacy** of the academic decision-making process. *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 193, 199, 110 S. Ct. 577, 584, 587 (1990)(holding that although courts should honor the "principle of respect for ***legitimate*** academic decision-making," "ferreting out ... invidious discrimination is a great, if not compelling, governmental interest.") This compelling interest is **not** served when, as in the case at bar, the legitimacy of the employer's decision-making process enjoys the benefit of the doubt. *See* FN 1 & 2, *supra*.

Even the Fourth Circuit has recognized "the interest in facilitating the eradication of discrimination" in the medical field. *Virmani v. Novant Health Incorporated, et al*, 259 F.3d 284, 289 (2001). However, the Court of Appeal's affirmation of the district court decision in the matter at hand cannot be reconciled with the compelling interest in eradicating employment discrimination in the medical profession. There are no perceived limitations to such a decision and, if upheld, one can hardly imagine a case worthy of a trial on the merits where the employer asserts incompetence, **even if**, as here, there is a question of fact as to the validity of the determination of incompetence.

Indeed, the continued blind deference to an employer's determination of incompetence is certain to produce a dangerous, liability-resistant strain of invidious discrimination in the medical profession. Because this is a question of exceptional importance,

Dr. Baqir respectfully urges this Court to grant his petition to clarify the role of courts in employment discrimination claims involving medical or academic employers.

CONCLUSION

In light of the foregoing reasons, Dr. Baqir respectfully requests that this Petition be granted.

Respectfully submitted this 15th day of June, 2006.

THE SUTTON FIRM, P.A.
For the Petitioner Dr. Riaz Baqir

April Burt Sutton (N.C. Bar No. 29134)
John R. Sutton, Jr. (N.C. Bar No. 29625)
Post Office Box 145
Candler, North Carolina 28715
828-667-5476 (Telephone)
828-667-0976 (Facsimile)

APPENDIX

TABLE OF CONTENTS
Appendix to Petition

Page

Opinion of the
United States Court of Appeals
for the Fourth Circuit
entered January 20, 2006 ..... App. 1

Notice of Judgment of the
United States Court of Appeals
for the Fourth Circuit,
With Attached Judgment
entered January 20, 2006 ..... App. 37

Memorandum Opinion and Order of the
United States District Court
for the Western District of North Carolina
entered September 3, 2004 ..... App. 44

Order of the
United States Court of Appeals
for the Fourth Circuit
Re: Denying Petition for Rehearing *en banc*
entered March 20, 2006 ..... App. 70

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: JANUARY 20, 2006]

RIAZ BAQIR, M.D.,
Plaintiff-Appellant,

v. No. 04-2369

ANTHONY J. PRINCIPI, Secretary,
Department of Veterans Affairs,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of North Carolina,
at Asheville.
Lacy H. Thornburg, District Judge.
(CA-02-179)

Argued: September 21, 2005

Decided: January 20, 2006

Before KING and GREGORY, Circuit Judges, and
R. Bryan HARWELL, United States District Judge
for the District of South Carolina, sitting by
designation.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Harwell joined. Judge Gregory wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: John Richard Sutton, Jr., SUTTON LAW FIRM, Candler, North Carolina, for Appellant. Paul Bradford Taylor, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** April Burt Sutton, SUTTON LAW FIRM, Candler, North Carolina, for Appellant. Gretchen C. F. Shappert, United States Attorney, Charlotte, North Carolina, for Appellee.

OPINION

KING, Circuit Judge:

Dr. Riaz Baqir appeals the district court's award of summary judgment in favor of the Secretary of the Department of Veterans Affairs (the "VA") in Baqir's employment discrimination suit. Baqir initiated this action in the Western District of North Carolina, alleging claims under, inter alia, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII"), and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (the "ADEA"). Baqir maintains that the VA subjected him to a hostile work environment during his employment at the VA Medical Center in Asheville, North Carolina (the "Asheville VA Center"); discharged him from that employment on the basis of his race, color, religion, national origin, and age; and retaliated against him for seeking administrative relief on his discrimination claims. Following discovery, the court awarded summary judgment to the VA on each of

Baqir's Title VII and ADEA claims. As explained below, we affirm.

I.

A.

In his complaint, Baqir alleges that he is black, he is a practicing Muslim, his national origin is Pakistani, and he was born on November 1, 1946.[1] After receiving a medical degree in Bangladesh in 1970, Baqir pursued his career as a physician in the United States, eventually as a cardiologist. He worked as a cardiologist at a hospital in New York between 1989 and 1994, and at the VA Medical Center in Wilkes-Barre, Pennsylvania (the "Wilkes-Barre VA Center"), between 1994 and 1998. In April 1998, Baqir left the Wilkes-Barre VA Center for a one-year unaccredited fellowship at the Pennsylvania Hospital in Philadelphia. His fellowship focused on training in the specialized field of interventional cardiology, which involves performing invasive procedures such as catheterizations to treat blockages in coronary arteries with balloons, stents, and cutting devices. During his fellowship, Baqir acted as the primary operator on only basic — and never complex — procedures. Nevertheless, upon the completion of his fellowship, Baqir's supervisors recommended him as

---

[1] Because this appeal is from an award of summary judgment to the VA, we are obliged to present and assess the relevant facts in the light most favorable to Baqir, the non-moving party. *See Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004).

an interventional cardiologist, observed that he was ready to perform more complicated procedures, and opined that he was prepared to work independently.

Baqir was thereafter hired to serve as an interventional cardiologist at the Asheville VA Center, a job opportunity created by the resignations of the only two interventional cardiologists on the Asheville VA Center's staff. Baqir was expected to serve as the sole interventional cardiologist at the Asheville facility and to work independently without further specialized training.[2]

On July 7, 1999, Baqir (then age fifty-two) received a written employment offer from the Asheville VA Center. The offer specified that Baqir's appointment was contingent upon his "satisfactory completion of the credentialing process" and "approval by the Medical Center Director," and that the appointment was to run for a temporary period not to exceed thirteen months. J.A. 62.[3] Baqir had been recruited to work for the Asheville VA Center by its Chief of Surgery, Dr. Peter McKeown; however, as reflected in the written offer, the final hiring authority rested with the Medical Center Director, James Christian, a non-physician.

---

[2] Baqir contends that he was not informed of these expectations at the time he was hired, and that he did not represent that he could meet these expectations. He points to no evidence, however, to dispute that these actually were the VA's expectations.

[3] Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.

On July 15, 1999, the Physician Professional Standards Board and the Medical Staff Executive Council (together, the "Board") of the Asheville VA Center met to review Baqir's credentials and consider his request for privileges in interventional cardiology.[4] It was observed that, although Baqir was recommended as an interventional cardiologist by his supervisors at the Pennsylvania Hospital, one of his colleagues at the Wilkes-Barre VA Center described Baqir's practice abilities as "average" and refused to sign a peer appraisal form because the number of procedures that Baqir claimed to have performed "appeared grossly exaggerated." J.A. 65. Based on these mixed reviews of Baqir's work, the Asheville VA Center's Chief of Medicine, Dr. Lewis Elliston, expressed concern that Baqir was inexperienced and that there was no interventional cardiologist on staff to proctor him. *Id.*[5] Accordingly,

---

[4] "Credentials" include such items as relevant licenses, information on physical and mental health status, peer assessments of professional competence, continuing education records, and board certifications. "Privileges," which are granted based on credentials and other considerations, allow a physician to practice at a hospital in a particular field of medicine.

[5] As one Asheville VA Center official explained, the Center requires each new employee to undergo "a probationary period" during which his performance is evaluated and he can be terminated without all of the formalities afforded to longer-term employees. J.A. 123-24. For a "physician provider," the probationary period includes a proctorship, or observation by another doctor "to have one more double-check on the competence of that provider." *Id.* at 124. The proctorship consists of observation and evaluation, and "[i]t is absolutely not an additional training period." *Id.* Under the "Bylaws and Rules of the Medical Staff" of the Asheville VA Center, a new

the Board recommended, on July 15, 1999, that Baqir be granted privileges in "general, diagnostic cardiology," but that privileges in interventional cardiology be withheld pending an assessment of Baqir by an interventional cardiologist at another facility. *Id.* at 65-66. These recommendations, as embodied in the minutes of the Board meeting, were accepted by the Asheville VA Center's then-Acting Chief of Staff, Dr. James Martin, and given final approval by Christian.[6]

B.

Baqir began working for the Asheville VA Center on July 18, 1999. According to the written offer, his annual salary was set at $92,217, and he was given a "special pay" enhancement of $41,500 based on his skill level. On July 19, 1999, Baqir signed a standard "Special Pay Agreement" that

---

physician must demonstrate competence during the period of proctoring, which generally lasts ninety days but may be extended to allow the physician to be observed in an adequate number and diversity of cases.

[6] Under the procedures in place at the time of Baqir's request for privileges, the Board made its recommendation to the Chief of Staff, who in turn made a further recommendation to the Medical Center Director. Both the Chief of Staff and the Medical Center Director possessed "independent authority and discretion to accept, decline, or modify recommendations of the Board." J.A. 199. The Chief of Staff was a member of the Board, and the Medical Center Director was an ex-officio member of the Board. Accordingly, they attended the meetings at which the Board's recommendations were made. It appears that the decisions of the Board, the Chief of Staff, and, ultimately, the Medical Center Director, were contemporaneously reached during these Board meetings.

contained provisions providing for the full refund of the special pay if his employment ended either "voluntarily or because of misconduct" prior to July 17, 2000. J.A. 211.

Pursuant to federal travel regulations, Baqir was entitled to payment of his moving expenses, as well as storage of household goods for ninety days (plus an additional ninety days under certain circumstances upon Baqir's written request). Baqir's belongings were picked up by a moving company, delivered to Asheville on July 27, 1999, and, because Baqir was not able to receive the goods, placed into storage by the moving company, all at the VA's expense. Baqir had until approximately October 27, 1999, to retrieve his belongings or request an extension of the paid storage period.

C.

During its July 15, 1999 meeting, the Board had decided that Baqir's direct supervisor, Elliston, would arrange for Baqir to go to the VA Medical Center in Durham, North Carolina (the "Durham VA Center"), for an assessment of his skills in interventional cardiology. Meanwhile, Baqir was to be proctored in diagnostic cardiology at the Asheville VA Center by Dr. Sundeep Mediratta. At the time he was proctoring Baqir, Mediratta was the only other cardiologist on staff at the Asheville VA Center, and he was not a member of the Board. Mediratta, a Hindu originally from India, is younger than Baqir. Although Mediratta did not practice interventional cardiology, he did perform invasive diagnostic catheterizations, in addition to carrying out

noninvasive functions such as reading tests and ordering medications.

Baqir asserts that he was subjected to hostile treatment as early as his first day of work at the Asheville VA Center, when he approached another Hindu colleague, who responded: "'Don't talk to me. Dr. Mediratta is your chief of cardiology. Report to him. And they have decided to . . . make you [a] noninvasive cardiologist.'" J.A. 110. On July 22, 1999, the day that Mediratta and Baqir first met, Mediratta allowed Baqir to take the lead in performing a diagnostic catheterization. Mediratta observed that Baqir "was not handling the catheters with confidence or accurately" and "did not know how to do the catheterization properly." J.A. 152. Mediratta relayed this assessment to Elliston, and they subsequently decided not to allow Baqir to perform any further catheterizations until he returned from his visit to the Durham VA Center. Baqir perceived the episode as further hostile treatment, in that Mediratta had become agitated with him and left the catheterization laboratory before the July 22, 1999 procedure had been completed, and in that Baqir was thereafter excluded from working in the catheterization laboratory (meaning that he was to practice only noninvasive cardiology). According to Baqir, Mediratta subsequently refused to communicate with him, perpetuating an abusive workplace atmosphere.

On July 23, 1999, Elliston wrote to the Chief of Cardiology at the Durham VA Center, Dr. Kenneth Morris, enclosing the Asheville VA Center's

files on Baqir. Elliston asked Morris for "an independent assessment by you of Dr. Baqir's interventional cath skills and any pertinent observations." J.A. 67. Elliston also wrote that "[d]uring our initial assessment of this practitioner he appeared to show signs of excessive insecurity in his procedures and techniques." *Id.*

On July 26, 1999, Dr. Arnold Brown became the Chief of Staff at the Asheville VA Center. On July 30, 1999, Brown directed memoranda to Baqir and Mediratta advising them that Mediratta was appointed to proctor Baqir in diagnostic cardiology for an additional period of at least ninety days. Brown also advised, in his memorandum to Baqir, that arrangements were being made to provide him with proctoring in interventional cardiology at the Durham VA Center, in view of the Asheville VA Center's inability to provide such proctoring itself. Thereafter, on August 26, 1999, Brown sent an e-mail message to his contacts at the Durham VA Center, reiterating the request for physicians there "to proctor Dr. Baqir [in interventional cardiology] and provide an appraisal of his skills and abilities." J.A. 71. Brown reminded his contacts at the Durham VA Center that "some concerns were verbally raised about Dr. Baqir by former colleagues." *Id.* Brown requested an assessment of whether Baqir could "independently perform all the duties of an interventional cardiologist at [that] time (i.e., without further training or experience)," and whether Baqir possessed "the expertise . . . to grant the . . . privileges which he [had] requested" in diagnostic cardiology and three specific procedures in interventional cardiology. *Id.*

Subsequently, on September 15, 1999, the Chief of Staff at the Durham VA Center, John Shelburne, wrote a memorandum to Morris (the Chief of Cardiology there) relaying the particular questions to be addressed in Baqir's evaluation and requesting that the assessment be completed as expeditiously as possible. Shelburne also advised Morris that "if you feel Dr. Baqir is technically competent, further evaluation by a cardiologist like yourself, on site at [the Asheville VA Center] is recommended." J.A. 72.

From September 20 to October 3, 1999, Mediratta was on leave from the Asheville VA Center. During that time period, Baqir was the only cardiologist on duty at the Asheville facility.

On October 4, 1999, Baqir went to the Durham VA Center to be evaluated. His visit concluded around October 22, 1999, the same day Morris sent a final report to Brown. Morris explained therein that Baqir had participated in ten cases at the Durham VA Center with three interventional cardiologists — Morris, Dr. Mitchell Krucoff, and Dr. Brian Annex.[7] According to Morris,

---

[7] At the time of Baqir's visit to the Durham VA Center, Morris (in addition to serving as that Center's Chief of Cardiology) was an Associate Professor of Medicine at the Duke University School of Medicine, where he taught in the interventional cardiology fellowship program. He had independently performed hundreds of complex interventional cardiology procedures; had been teaching such procedures for at least twelve years; and had observed approximately fifty colleagues and trainees performing such procedures. At that same time (October 1999), Krucoff was serving part-time at the Durham VA Center as the Chief of Cardiovascular

the "unanimous view" of these physicians was that Baqir was "not ready to perform all the duties of an interventional cardiologist," and that he did "not currently possess the expertise to be granted privileges" which had been requested by him in three specific interventional cardiology procedures. J.A. 77.[8] Morris concluded that Baqir "likely [could] perform diagnostic catheterization in an adequate fashion." *Id.* Morris warned, however, that because he and the other physicians had "concentrated on [Baqir's] interventional skills while he was with us,"

Laboratories, and was a full-time faculty member at Duke's medical school. He had performed approximately 5,000 interventional cardiology procedures, had trained dozens of interventional cardiology fellows, had observed hundreds of other physicians in the field, and had been involved in establishing some twenty-four catheterization laboratories in India, Israel, Egypt, and the United States. The record does not contain any evidence of Annex's qualifications.

[8] In an October 21, 1999 e-mail message to Morris, Krucoff observed that, although Baqir appeared "to be a highly motivated cardiologist with great enthusiasm to learn," it was clear to Krucoff that Baqir did "not have [a] sufficient grasp of the selection, set up or application of basic interventional devices to operate independently as an interventional attending." J.A. 78. Krucoff later testified in a deposition that "I can say I actually really like Dr. Baqir, but this was not even close. He simply was nowhere near ready to operate as an independent interventionalist at the time we saw him here." J.A. 141-42. Morris testified that "Dr. Baqir's apparent familiarity with the tools [of interventional cardiology] was more that at the level of a beginning fellow than a completing fellow." J.A. 168. Morris found himself "a little embarrassed . . . at the situation" in assessing Baqir, in that "we had this fellow in front of us who obviously had some — a substantial amount of information, who had invested an entire year in training, and did not appear ready to do these procedures." *Id.* at 169.

their "observations in this area [diagnostic catheterization] may not be adequate." *Id.*

Shortly thereafter, on October 29, 1999, Mediratta wrote a letter to Elliston reporting on his early observations of Baqir in diagnostic cardiology at the Asheville VA Center. According to Mediratta, Baqir was "unable to complete a diagnostic procedure . . . without considerable help" and was unable to use the catheter equipment properly. J.A. 79. Mediratta advised that Baqir could not perform diagnostic catheterizations independently and that he needed "to be supervised or receive further training." *Id.*

D.

On November 4, 1999, Baqir requested from Brown at the Asheville VA Center a copy of his credentialing file, including all notes and written communications with the Durham VA Center. Baqir reviewed the file that same day and immediately notified Brown and Elliston of his contention that Morris had overstated the extent of the Durham VA Center physician's observations; that is, Baqir contended that he had actually participated in fewer and less complex procedures than reported by Morris, and that his visit to the Durham VA Center was insufficient to assess his interventional cardiology skills. He also noted that there was now a consulting interventional cardiologist at the Asheville VA Center. Accordingly, Baqir requested that he be permitted to work with the consulting interventional cardiologist "until such time that I

can be considered as [having] completed my proctorship successfully." J.A. 82.

On November 5, 1999, the Board met to review the report from the Durham VA Center on Baqir's interventional cardiology skills, his response thereto, and Mediratta's report on Baqir's ability to perform diagnostic procedures. In response to Baqir's contention that he had not been proctored on enough cases and should be proctored longer, "Dr. Brown pointed out that proctoring is used to determine competence and is not a period of training." J.A. 84. It was also acknowledged that "Dr. Baqir was hired as a fully trained interventional cardiologist." *Id.* Based on the negative assessments before them, the Board members present at the meeting voted unanimously to recommend denial of the privileges requested by Baqir in interventional cardiology, as well as to recommend that such denial be reported to the National Practitioner Data Bank in accordance with their interpretation of VA regulations.[9] Brown advanced the Board's recommendations to Christian, who approved them. Both Brown and Christian were in attendance at the November 5, 1999 meeting.

---

[9] 9The National Practitioner Data Bank contains information about physicians' licensure, professional society memberships, medical malpractice payment history, and record of clinical privileges. It is intended "to improve the quality of health care by encouraging State licensing boards, hospitals and other health care entities . . . to identify and discipline those who engage in unprofessional behavior; and to restrict the ability of incompetent physicians . . . to move from State to State without disclosure or discovery of previous medical malpractice payment and adverse action history." *See* http://www.npdb-hipdb.com/npdb.html.

On November 12, 1999, Baqir's wife, Dr. Marriyam Moten, then-Chief of Cardiology at the Wilkes-Barre VA Center, spoke by telephone with Elliston, a member of the Board who had attended its November 5 meeting. According to Moten, Elliston advised her during this conversation that Baqir was to be terminated because of his age. (Baqir had recently turned fifty-three.) Elliston told Moten "that 'age [was] the major and only factor'" for Baqir's discharge, and that "'interventional cardiology is meant for people in their thirties.'" J.A. 197. Elliston later conceded that he had told Moten that interventional cardiology "was a young man's sport." *See* Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. 3 at 25. Elliston asserted that he had not meant to convey that Baqir was being fired because of his age, but rather had been attempting to recommend to Baqir, in a kind manner, that he practice in another area of cardiology for which he possessed the requisite capabilities.

On November 15, 1999, Christian informed Baqir by letter that he was being terminated from his employment, effective December 3, 1999, because he had not been granted the privileges necessary to fulfill the requirements of the position of interventional cardiologist for which he had been hired. According to Christian, he possessed the sole authority not only to hire, but also to fire, Baqir. In deciding on Baqir's discharge, Christian took into account the Board's recommendations, the reports of Morris (at the Durham VA Center) and Mediratta (at the Asheville VA Center), his own review of Baqir's file, the needs of the Asheville VA Center for a fully trained interventional cardiologist, and the

fact that there was no interventional cardiology training program at the Asheville facility.

On November 18, 1999, the Asheville VA Center's Medical Staff Coordinator, Margaret Villalpando, contacted legal counsel to verify that the Center was required to report the denial of Baqir's request for privileges in interventional cardiology to the National Practitioner Data Bank. Villalpando received an affirmative response and thereafter, at Christian's direction, submitted the report about Baqir to the Data Bank.

E.

On December 15, 1999, Baqir filed an administrative complaint in the VA's Office of Resolution Management alleging discrimination. *See generally* 29 C.F.R. pt. 1614 (outlining pertinent complaint procedures for federal employees). Baqir had previously communicated with a VA Equal Employment Opportunity Counselor (the "EEO Counselor") on November 1, November 10, and December 1, 1999. Baqir points to no evidence, however, establishing that any official of the Asheville VA Center had become aware, prior to the filing of his administrative complaint, that Baqir had sought relief through the EEO Counselor.

By the time Baqir's administrative complaint was filed, his household goods that had been stored at the VA's expense had been impounded, because Baqir had neither retrieved his belongings nor requested an extension of the paid storage period. The VA was not informed of the impoundment and

did not direct it; rather, the VA simply did not pay the storage bill beyond October 27, 1999, the end of the standard ninety-day period authorized under the applicable federal travel regulations.

On December 22, 1999, following the filing of Baqir's administrative complaint, the Accounting Section of the Business Office at the Asheville VA Center sent a notice to Baqir instructing him to refund the special pay portion of his salary. The Chief of the Accounting Section, Vernon Lane, had decided to send the notice after receiving a routine notice of Baqir's departure from the Asheville VA Center and interpreting his Special Pay Agreement to require such a reimbursement. The parties dispute whether the Agreement actually mandated repayment in the circumstances of Baqir's discharge. There is no dispute, however, that Lane himself was unaware on December 22, 1999, that Baqir had filed his administrative complaint.[10]

---

[10] Baqir asserts that the VA replaced him in November 2000 with a similarly qualified interventional cardiologist who is younger than Baqir and originally from India. For his part, Baqir apparently did not work again until March 2003, when he took a position at the Pennsylvania Hospital as a noninvasive cardiologist while being retrained as an invasive cardiologist under the supervision of Dr. Vidya Banka, the same physician who had overseen Baqir's fellowship in interventional cardiology. According to Banka, by March 2004, Baqir was "performing in assisting roles as an interventional cardiologist," and he was "progressing well" although his "learning curve [was] slow."-J.A. 98. Banka stated that, because of rapid advances in interventional cardiology while Baqir was out of that field from December 1999 to March 2003, he needed "more time for retraining." *Id.*

II.

On July 29, 2002, Baqir initiated this action against the VA in the Western District of North Carolina, alleging four counts under federal law and four counts under state law.[11] On September 11, 2003, the district court dismissed the four state-law counts. On March 31, 2004, the VA filed a motion for summary judgment on the remaining federal-law counts, i.e., the Title VII and ADEA claims. In these counts, Baqir asserted that the VA: (1) terminated his employment based on his race, color, religion, and national origin, in contravention of Title VII; (2) terminated his employment based on his age, in violation of the ADEA; (3) subjected him to a hostile work environment; and (4) retaliated against him for contacting the EEO Counselor on November 1, 1999, while he was still employed at the Asheville VA Center.

Under Rule 7.1 of the Western District of North Carolina's Local Rules of Civil Procedure, Baqir was required to respond to the VA's summary judgment motion within fourteen days. Thus, when Baqir had not responded to that motion by April 21, 2004, the court entered judgment in favor of the VA and dismissed the case with prejudice. On April 22, 2004, Baqir filed a motion for relief from judgment, contending that his counsel was unaware of the pertinent local rule and in good faith believed that

---

[11] Baqir has indicated that he properly exhausted his administrative remedies before initiating this action, and the VA does not contend otherwise. *See* 29 U.S.C. § 633a; 42 U.S.C. § 2000e-16; 29 C.F.R. pt. 1614.

he had thirty days to respond. By its Memorandum and Order of September 3, 2004 (the "Order"), the court granted Baqir's motion for relief from judgment, but also granted the VA's summary judgment motion on the merits. Baqir has filed a timely notice of appeal, and we possess jurisdiction under 28 U.S.C. § 1291.

III.

We review de novo an award of summary judgment, viewing the facts and inferences drawn therefrom in the light most favorable to the non-moving party. *See Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004). Such an award "is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)) (alteration in original).

IV.

A.

We first address Baqir's claim that the VA discharged him on the basis of his race, color, religion, and national origin, in contravention of Title VII. This claim is governed by section 717(a) of Title VII, which provides that "[a]ll personnel actions affecting" certain federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-

16(a). As for private-sector employees, section 703(a)(1) of Title VII makes it unlawful for their employers "to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1). Although phrased differently, section 703(a)(1) and section 717(a) have generally been treated as comparable, with the standards governing private-sector illegal claims applied to such claims brought by federal employees. *See Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc) (recognizing that disparate treatment claims under section 703(a)(1) and section 717(a) are subject to same inquiries).

In asserting that the evidence suffices to require a trial on his Title VII illegal discharge claim, Baqir relies on the familiar *McDonnell Douglas* burden-shifting framework. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (en banc) (citing, inter alia, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973), for proposition that plaintiff could avert summary judgment on section 703(a)(1) illegal discharge claim by utilizing burdenshifting framework); *Page*, 645 F.2d at 231 (approving district court's application of *McDonnell Douglas* framework to section 717(a) failure-to-promote claims). Under the first step of the *McDonnell Douglas* framework, Baqir must demonstrate a prima facie case of prohibited discrimination. *See Hill*, 354 F.3d at 285. Baqir's prima facie case may be established by showing that (1) he is a member of a protected class, (2) he suffered an adverse employment action (such as discharge), (3) he was performing his job duties at a level that met the

employer's legitimate expectations at the time of the adverse employment action, and (4) his position remained open or was filled by a similarly qualified applicant outside the protected class. *See id.*

Without discussing the other elements of the prima facie case, the district court properly concluded that Baqir's Title VII illegal discharge claim failed for lack of evidence on the third element, i.e., that he was performing his job duties at a level that met the VA's legitimate expectations. *See* Order at 13-14. Simply put, Baqir was hired to serve at the Asheville VA Center as an interventional cardiologist who could work independently and without further training, but he was unable to meet the VA's expectations in that regard, as confirmed by the physicians at the Durham VA Center who assessed Baqir's capabilities. That assessment is not one which we are inclined to impugn. *See Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 218 (4th Cir. 2002) (observing that "[h]ospitals have historically had wide discretion to make decisions regarding their medical staff").

Baqir himself does not question the credentials of the Durham VA Center physicians or accuse them of harboring discriminatory motives. Rather, he attempts to discredit the Durham VA Center physicians' assessment of his skills by speculating that it was tainted by negative reports about Baqir from the Asheville VA Center and a reluctance on the part of the Durham VA Center physicians to render a positive evaluation that might have required them to travel to Asheville for further observations. *See* J.A. 67 (letter from Elliston at

Asheville VA Center to Morris at Durham VA Center observing that "[d]uring our initial assessment of [Baqir] he appeared to show signs of excessive insecurity in his procedures and techniques"); J.A. 71 (email message from Brown at Asheville VA Center to contacts at Durham VA Center reminding them that "some concerns were verbally raised about Dr. Baqir by former colleagues"); J.A. 72 (internal memorandum from Shelburne at Durham VA Center to Morris advising him that "if you feel Dr. Baqir is technically competent, further evaluation by a cardiologist like yourself, on site at [the Asheville VA Center] is recommended").

There is no evidence, however, that the opinions of the Durham VA Center physicians were actually tainted in any manner. Rather, their conclusions were unanimous and unequivocal: Baqir was "not ready to perform all the duties of an interventional cardiologist" and did "not currently possess the expertise to be granted privileges" which had been requested by him in three specific interventional cardiology procedures. J.A. 77; *see also supra* note 8. Indeed, Baqir has essentially conceded that he could not satisfy the VA's expectations, in that he has asserted that he never represented to the VA that he could immediately function independently as an interventional cardiologist.

Nevertheless, Baqir insists that his evidence is sufficient to create a genuine issue of fact on the third element of the prima facie case. First, he points out that "he had substantial qualifications, experience and training, along with the

recommendations of highly qualified interventional cardiologists" who supervised his fellowship at the Pennsylvania Hospital. *See* Appellant's Br. at 16. The crucial inquiry, however, is whether Baqir was meeting the legitimate expectations of the VA. At best, Baqir's evidence indicates that his qualifications, experience, and training should have left him prepared to work independently as an interventional cardiologist, and that his supervisors at the Pennsylvania Hospital believed he was ready to do so (although, notably, he had never served as the primary operator on a complex interventional cardiology procedure during his fellowship there).

Next, Baqir asserts that he was denied a minimum ninety-day proctorship and allowed to participate in only a "grossly inadequate" number of procedures. *See* Appellant's Br. at 16. He offers no evidence, however, that a ninety-day proctorship was required under the circumstances of his employment, in which it quickly became apparent to VA officials that Baqir was not competent to serve in the position for which he had been hired. Baqir's contention that his proctorship was prematurely halted seems to rest on the notion that he was entitled to time and training to improve his skills. This notion is contradicted by the undisputed facts: Proctorship was a period of evaluation — not training — for all new physicians at the Asheville VA Center, and, in any event, the Asheville facility was unable to provide training in interventional cardiology.

Finally, Baqir points out "that despite Dr. Mediratta's unfavorable assessment of Dr. Baqir's skills, the [Asheville VA Center] had no problem allowing Dr. Baqir to serve as the only cardiologist on staff while Dr. Mediratta was on vacation for two weeks" in September and October 1999. *See* Appellant's Br. at 16. Baqir seems to suggest that his solo service as a cardiologist belies two propositions: first, that Mediratta's opinion was trustworthy; and second, that officials at the Asheville VA Center actually doubted Baqir's skills. Baqir also emphasizes the longstanding discord between Muslims of Pakistani origin (such as him) and Hindus of Indian origin (such as Mediratta). Unfortunately for Baqir, whether Mediratta's opinion was biased or trustworthy is largely irrelevant to the viability of Baqir's Title VII illegal discharge claim. Mediratta only evaluated Baqir's skills as a diagnostic cardiologist; Baqir had been hired as an interventional cardiologist, and the assessment of his skills in that specialty was left to the physicians at the Durham VA Center. Furthermore, there is no evidence that Baqir was performing any invasive procedures — diagnostic or interventional — during Mediratta's two-week leave. The Asheville VA Center's willingness to permit Baqir to work alone for that period therefore is not indicative of his abilities as an interventional cardiologist or the VA's true perception thereof. Accordingly, we are constrained to agree with the district court that Baqir's Title VII illegal discharge claim fails for lack of evidence to establish the third element of his prima facie case, that he was performing his job duties at a level that met the VA's legitimate expectations.

B.

We next address Baqir's claim that his discharge was based on his age, in violation of the ADEA. Under section 15(a) of the ADEA, "[a]ll personnel actions affecting [certain federal] employees . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). Similarly, section 4(a)(1) of the ADEA renders it unlawful for private-sector employers "to discharge any individual . . . because of such individual's age." *Id.* § 623(a)(1). As in the Title VII context, we have recognized that, in order to prove an ADEA illegal discharge claim against the federal government, a plaintiff must make the same showing as would be required against a private employer. *See Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

Baqir relies on direct evidence in support of his ADEA illegal discharge claim, compelling application of a mixed-motive framework. *See EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 163 (4th Cir. 2004) (recognizing that ADEA claim may be proved under mixedmotive framework, requiring plaintiff to produce, "at most, evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision" (internal quotation marks omitted)). Specifically, Baqir points to Elliston's statements following the November 5, 1999 Board meeting at which it was decided to deny Baqir's request for privileges in interventional cardiology. According to Moten, Elliston informed her on November 12, 1999, that Baqir (who was then

fifty-three years old) was to be terminated because of his age. Accepting Moten's statements as true, as we must at the summary judgment stage, Elliston told her "that 'age [was] the major and only factor'" for Baqir's discharge, and that "'interventional cardiology is meant for people in their thirties.'" J.A. 197. Thereafter, on November 15, 1999, Christian informed Baqir that he was being discharged because he had not been granted the privileges necessary to serve as an interventional cardiologist.

The district court concluded that Elliston's comments to Moten — even assuming that he had been speaking on behalf of himself and the other Board members present at the November 5, 1999 meeting — were insufficient to prove that Baqir had been discharged based on his age. *See* Order at 15. Relying on the principle that "'an employer will be liable not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision,'" the court recognized that "neither Dr. Elliston nor the Standards Board may 'be viewed as the one principally responsible for the decision'" to fire Baqir. *Id.* at 15-16 (quoting *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc)). The court observed that the actual decisionmaker here was Christian, and that there was no evidence that he "was illegally influenced" by the Board or simply "'rubber stamp[ed]'" its recommendation. *Id.*

As did the district court, we infer in Baqir's favor that Elliston's comments are reflective of age-based animus demonstrated during the deliberations

at the November 5, 1999 Board meeting — deliberations resulting in the denial of Baqir's request for interventional cardiology privileges and, inevitably, his discharge. Unlike the district court, however, we cannot conclude that these comments were unattributable to Christian, who we accept to have been the actual decisionmaker.[12] Christian was an ex-officio member of the Board present at the November 5 meeting, as indicated in the meeting minutes. *See* J.A. 83. Moreover, viewing the facts in the light most favorable to Baqir, it appears that the three steps for the privileges determination — a recommendation by the Board, a further recommendation by Brown as the Chief of Staff, and final approval by Christian as the Medical Center Director — occurred contemporaneously during that meeting. Elliston's comments are therefore attributable to Christian, as well as Elliston and the other participating Board members.

Even so, Baqir cannot survive summary judgment on his ADEA illegal discharge claim. Under the mixed-motive framework applicable in ADEA cases, although Baqir can prove that age was a motivating factor in his discharge, the VA "can nonetheless avoid liability by proving that it would have terminated [Baqir] even in the absence of a discriminatory motive." *Warfield-Rohr*, 364 F.3d at 164 (citing *Price Waterhouse v. Hopkins*, 490 U.S.

---

[12] As it is ultimately of no significance to the viability of Baqir's ADEA illegal discharge claim, we assume herein that Christian was the actual decisionmaker, as the VA maintains and the district court recognized. We note, however, that Baqir contends that Elliston and Mediratta were the actual decisionmakers.

228, 244-45 (1989) (plurality opinion); *id.* at 276-77 (O'Connor, J., concurring in the judgment)).[13] Based on the unrefuted evidence that Baqir could not perform his job duties as an interventional cardiologist at a level that met the VA's legitimate expectations, *see supra* Part IV.A, the VA has demonstrated that it would have terminated Baqir absent any age-based animus. Baqir therefore cannot proceed with his ADEA illegal discharge claim.

C.

We turn to Baqir's claim that he was subjected to a hostile work environment during his employment at the Asheville VA Center. In order to proceed to trial on this claim, Baqir must forecast evidence that: (1) he experienced unwelcome harassment; (2) the harassment was based on his race, color, religion, national origin, or age; (3) the harassment was sufficiently severe or pervasive to alter the conditions of his employment and to create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *See Bass v. E.*

---

[13] By way of the Civil Rights Act of 1991, Congress eliminated an employer's ability to avoid liability in certain Title VII cases upon proof that it would have taken the same adverse employment action absent a discriminatory motive. *See Warfield-Rohr*, 364 F.3d at 164 n.2 (citing 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003). Because Congress did not similarly amend the ADEA, however, ADEA mixed-motive cases remain subject to the *Price Waterhouse* analysis. *Warfield-Rohr*, 364 F.3d at 164 n.2.

I. Dupont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003).[14]

Baqir has identified the following acts as unlawful harassment: on July 18, 1999, Baqir's first day of work at the Asheville VA Center, a Hindu colleague refused to talk to Baqir and told him to report only to Mediratta; on July 22, 1999, the day Baqir and Mediratta met, Mediratta became agitated while Baqir was performing a diagnostic catheterization and left the catheterization laboratory; thereafter, Baqir was excluded from working in the laboratory pending his visit to the Durham VA Center (meaning he could practice only noninvasive cardiology), and Mediratta would not communicate with him despite having been assigned as his proctor in diagnostic cardiology; Baqir was required to travel to Durham for the assessment of his interventional cardiology skills; and he was afforded only an inadequate period of evaluation before being denied privileges in interventional

---

[14] Insofar as he alleges harassment based on his race, color, religion, or national origin, Baqir's hostile work environment claim is presumably cognizable under section 717 of Title VII, 42 U.S.C. § 2000e-16. *Cf. Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999) (reviewing merits of plaintiff's section 717 harassment claim). As for any alleged age-based harassment, we have previously assumed, without deciding, that a hostile work environment claim is generally cognizable under the ADEA for plaintiffs age forty or older. *See Burns v. AAF-McQuay, Inc.*, 166 F.3d 292, 294 (4th Cir. 1999); *Causey v. Balog*, 162 F.3d 795, 801 n.2 (4th Cir. 1998).

cardiology and discharged. According to Baqir, "[d]iscriminatory animus based on a protected trait can be shown by the employer's differential treatment of similarly situated employees outside of [his] protected classes." *See* Appellant's Br. at 25-26. The only evidence of disparate treatment that he points to, however, is evidence that the Asheville VA Center extended the proctorships of other physicians (of unspecified race, color, religion, national origin, and age) so that those physicians could be observed performing a sufficient number of procedures on which to assess their competency.[15]

Baqir's allegations cannot sufficiently support his hostile work environment claim. As discussed above, Baqir offers no evidence that a longer proctorship was required or had ever been permitted under the circumstances of his employment, in which it quickly became apparent to VA officials that Baqir was not competent to work independently as an interventional cardiologist. *Cf. Causey v. Balog*, 162 F.3d 795, 801-02 (4th Cir. 1998) (concluding that plaintiff's "conclusory statements that [the employer]

---

[15] Notably, in pleading his hostile work environment claim and discussing it herein, Baqir has not explicitly alleged a specific discriminatory animus with respect to any particular actor. In rejecting this claim, the district court observed that Baqir had forecast "no evidence that any of [the] alleged 'harassment' was based upon a protected trait." Order at 17-18. We can at least infer, however, that Baqir means to allege that his age motivated the Board's conduct (in view of Elliston's comments following the November 5, 1999 meeting), and that Baqir's religion and national origin prompted the acts of Mediratta and the other Hindu colleague (based on Baqir's general emphasis herein on the longstanding conflict between Hindus of Indian origin and Muslims of Pakistani origin).

treated him less favorably than younger black and white employees of similar rank . . . , without specific evidentiary support, cannot support an actionable claim for [race- or age-based] harassment"). Indeed, the unrefuted evidence shows that all new Asheville VA Center physicians were required to undergo a proctorship to ensure their competency to practice, and that Baqir had to go to the Durham VA Center for an assessment of his interventional cardiology skills because there was no interventional cardiologist on staff at the Asheville facility to proctor him in that specialty. Thus, the decision of officials at the Asheville VA Center to wait for the report of the Durham physicians before allowing Baqir to perform interventional cardiology procedures (or, after his questionable performance of a diagnostic catheterization with Mediratta, any other invasive procedures), is not suggestive of illegal harassment, but rather of "a healthy concern for the safety of patients." *See* Order at 17. Otherwise, Baqir merely complains of rude treatment by Mediratta and another Hindu colleague — conduct falling short of that required to sustain a hostile work environment claim. *See id.* (recognizing that Baqir's "allegations that one doctor told him not to speak to him, that Dr. Mediratta did not communicate with him, and that Dr. Mediratta became agitated on one occasion are not facts that describe an 'abusive' environment"); *cf. Bass*, 324 F.3d at 765 (concluding that allegations "of a workplace dispute regarding [plaintiff's] reassignment and some perhaps callous behavior by her superiors . . . do not describe . . . severe or pervasive gender, race, or age based activity").

Accordingly, Baqir has not shown sufficient evidence to proceed with his hostile work environment claim.

D.

Finally, we address Baqir's retaliation claim.[16] Baqir is required to establish, for his prima facie case of retaliation, that he engaged in a protected activity, that the employer took an adverse action against him, and that a causal relationship existed between his protected activity and the employer's adverse action. *See Price v. Thompson*, 380 F.3d 209,

---

[16] The VA does not dispute that a federal employee, like Baqir, may pursue a retaliation claim under Title VII or the ADEA. We therefore assume that Baqir's retaliation claim is cognizable under both Title VII and the ADEA. We observe, however, that neither section 717 of Title VII, 42 U.S.C. § 2000e-16, nor section 15 of the ADEA, 29 U.S.C. § 633a, explicitly provides federal employees with such a cause of action. Nonetheless, several of our sister circuits have allowed retaliation claims under section 717 of Title VII and section 15 of the ADEA. *See, e.g.*, *Forman v. Small*, 271 F.3d 285, 298 (D.C. Cir. 2001) (holding that section 15 of ADEA "by its *own* terms alone prohibits" retaliation as one form of age discrimination); *Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981) (interpreting broad language of section 717 of Title VII to outlaw reprisals); *Ayon v. Sampson*, 547 F.2d 446, 449-50 (9th Cir. 1976) (concluding that section 717 incorporates anti-retaliation provision for private-sector employees found in section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a)). Moreover, the regulations establishing the pertinent complaint procedures for federal employees specifically prohibit retaliation. *See* 29 C.F.R. § 1614.101(b) (providing that "[n]o person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act [or] the Age Discrimination in Employment Act . . . or for participating in any stage of administrative or judicial proceedings under those statutes").

212 (4th Cir. 2004). If the employer can then proffer a nonretaliatory reason for its action, Baqir must show that the employer's proffered reason is pretextual. *See id.*

Baqir contends that the VA retaliated against him in response to his initial contact with the EEO Counselor on November 1, 1999, and his subsequent filing of an administrative complaint on December 15, 1999. On appeal, Baqir identifies three acts of alleged retaliation by the VA: causing his household goods to be impounded for nonpayment of storage fees after October 27, 1999; reporting the denial of his request for privileges in interventional cardiology to the National Practitioner Data Bank upon obtaining the advice of counsel on November 18, 1999; and demanding the return of the special pay portion of his salary by notice of December 22, 1999.

The district court assumed that Baqir had stated a prima facie case of retaliation, but concluded that his claim nonetheless failed for lack of evidence to rebut the VA's proffered nonretaliatory reasons for its conduct. Unlike the district court, we are unwilling to accept that Baqir has demonstrated a prima facie case. Even assuming that the conduct alleged by Baqir can be considered to constitute "adverse actions" sufficient to sustain a retaliation claim, he must be able to show that the relevant officials at the Asheville VA Center were aware of his contact with the EEO Counselor or his filing of an administrative complaint at the time the alleged retaliation occurred. *See Hooven-Lewis v. Caldera*, 249 F.3d 259, 273 (4th Cir. 2001) (recognizing that plaintiff's "informal contacts with

the EEO and informal complaints [would be] protected activities *if* the accused person or entity knew about them" (emphasis added)).

Baqir has not pointed to any evidence that officials at the Asheville VA Center knew, prior to December 15, 1999, that he had been in contact with the EEO Counselor as of November 1, 1999. Therefore, Baqir cannot establish retaliatory motive with respect to the VA's nonpayment of his storage fees as of October 27, 1999 (notably, prior to even his first contact with the EEO Counselor), or the report to the National Practitioner Data Bank sometime after November 18, 1999. Only the December 22, 1999 notice demanding return of his special pay came after Baqir's administrative complaint was filed on December 15, 1999. That notice, however, was generated at the discretion of Lane (the Chief of the Asheville VA Center's Accounting Section), and there is no suggestion that Lane was aware at that time of Baqir's administrative complaint. We therefore conclude that Baqir's retaliation claim lacks merit.

V.

Pursuant to the foregoing, the summary judgment award of the district court must be affirmed.

AFFIRMED

GREGORY, Circuit Judge, concurring in part and dissenting in part:

Although I agree that Baqir's claims of discrimination on the basis of race, color, religion, and national origin; hostile work environment; and retaliation fail as a matter of law, I cannot conclude that summary judgment is appropriate with respect to Baqir's claim of age discrimination. Baqir has produced direct evidence that the *sole* reason for his termination was his age. Although the VA has produced evidence that Baqir was instead fired because of his performance, the question of what actually motivated the VA's decision is for the factfinder, not this Court, to resolve. I therefore respectfully dissent as to Part IV.B of the majority opinion.

The ADEA makes it unlawful "to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). Thus, the reason for the employer's decision is the critical inquiry. Viewing the evidence in the light most favorable to Baqir, "age [was] the *major and only* factor" behind the VA's decision to terminate him, as the majority recognizes.[1] *See* J.A. 197 (emphasis added). The majority also accepts that this statement is attributable to the actual decision-maker. We cannot grant summary judgment to the employer under these circumstances.

---

[1] Baqir's evidence of Lewis Elliston's statement, which Baqir's wife recounted in her affidavit, need not be corroborated. *See EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 164 (4th Cir. 2004). Nevertheless, I note that Elliston conceded that he related Baqir's termination to age in telling Baqir that interventional cardiology was "a young man's sport." *See* Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. 3 at 25.

The majority believes that the VA may "avoid liability by proving that it would have terminated [Baqir] even in the absence of a discriminatory motive." *EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 164 (4th Cir. 2004). Although this is so for the traditional *mixedmotive* case, it is not a viable theory on summary judgment here, where not only is there direct evidence of discriminatory animus, but also that the discriminatory animus was the *sole motive* for his discharge.

The exceptional nature of Baqir's evidence merits emphasis. Through Lewis Elliston's statement, which has every indicia of reliability as it was made against his own interest, Baqir shows not just that age was one motive for his termination, but that it was the *only* motive behind his discharge. It is perhaps because such an admission is so unusual that the majority's analysis goes astray. Typically, a plaintiff is only able to show that an employer exhibited age-based animus or that age was one of the motivating factors for its decision. In such circumstances, it is entirely appropriate to evaluate whether age made a difference to the outcome of the employer's decision; liability is not appropriate if the legitimate factors that the employer actually considered alone supported its decision.

However, where, as here, a single illegitimate reason was the actual basis for the employer's decision, the fact that an alternative legitimate basis might also have existed is without consequence. In the present case, Baqir's evidence is that the VA did not consider his performance at all at the time it made its decision. Therefore, the VA cannot prevail

at the summary judgment stage through evidence that legitimate considerations motivated its decision instead. Rather, the VA's evidence creates an issue of fact regarding what its motives were.[2]

I note that all this is not to say that Baqir has proved his case. The VA may, of course, argue to the factfinder that Baqir's performance was one of, if not the only reason it actually decided to terminate Baqir. As recounted by the majority, the VA has produced evidence that Elliston's explanation for the VA's decision is untrue. However, it is not our function on summary judgment to weigh the evidence and assess credibility. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, we must only determine whether material facts remain in issue. Here, there is a genuine factual question as to what the VA's actual motives were. Clearly, a reasonable juror would be entitled to believe the very words attributable to the decisionmaker, stating that the *sole* reason Baqir was terminated was because of his age. Accordingly, summary judgment for the VA on Baqir's age discrimination claim was inappropriate.

---

[2] Even under the traditional mixed-motive scenario, "[a]n employer may not . . . prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion). Thus, the question is not whether an employer "could have" terminated the employee regardless of his age, but whether the employer "would have" done so. *See Warfield-Rohr*, 364 F.3d at 164. Post-hoc justifications have no effect under a statute concerned only with a defendant's actual motives. Although the VA argues that it considered its legitimate motive contemporaneously with making its decision, the evidence is contradictory on this point.

UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

NOTICE OF JUDGMENT
January 20, 2006

[ENTERED: JANUARY 20, 2006]

TO: John Richard Sutton Jr., Esq.
April Burt Sutton, Esq.
Paul Bradford Taylor, Esq.

Judgment was entered this date in Case Number(s): 04-2369

The Court's decision is enclosed.

PETITION FOR REHEARING (FRAP 40)
PETITION FOR REHEARING EN BANC (FRAP 35)

Filing Time A petition must be received in the clerk's office within 14 days after judgment to be timely. There are three exceptions to this rule:

(1) In all civil cases in which the United States or an agency or officer thereof is a party, any petition for rehearing must be received in the clerk's office within 45 days after entry of judgment.

(2) The Court may grant an extension of time or leave to file a petition for rehearing out of time if the

party establishes that the delay resulted from the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or other circumstances wholly beyond the control of counsel or a party proceeding without counsel.

(3) Prisoner petitions are deemed filed when delivered to prison authorities.

If a petition for rehearing en banc is to be filed, it must be filed at the same time and in the same document as the petition for rehearing and must be clearly identified in the title.

Each case number to which the petition applies must be listed on the petition, even in companion or consolidated cases. Failure to list the individual case numbers on the petition will result in the unidentified cases proceeding to mandate even if a timely petition for rehearing has been filed in a companion or consolidated case.

A timely filed petition for rehearing or petition for rehearing en banc will stay the mandate and toll the running of time for filing a petition for writ of certiorari.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals, and the conflict is not addressed in the opinion.

4. The proceeding involves one or more questions of exceptional importance.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 4 copies of the petition (20 copies of a petition for rehearing en banc), and a copy of the Court's opinion must be attached to each copy of the petition.

BILL OF COSTS (FRAP 39)

Filing Time A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs on or before 02/03/06.

MANDATE (FRAP 41)

Issuance Time In original proceedings before this Court, there is no mandate. Unless the Court shortens or extends the time, in all other cases, the mandate issues 7 calendar days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay the issuance. If the petition or motion is denied, the mandate will issue 7 calendar days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL CASES
(Plan in Implementation of the CJA)

Criminal — In criminal cases, counsel must inform the defendant in writing of the right to file a petition for writ of certiorari from an adverse decision of this Court. Counsel appointed under the Criminal Justice Act must file their vouchers within 60 days of entry of judgment, denial of a petition for rehearing, or the grant or denial of a petition for writ of certiorari, whichever is later.

PETITION FOR WRIT OF CERTIORARI
(Sup.Ct.R. 13)

Filing Time — Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. The petition must be filed in the United States Supreme Court within 90 days of this Court's entry of judgment. The time does not run from the issuance of the mandate. If a petition for rehearing is timely filed, the time runs from the denial of that petition. Content, fees, and number of copies of a petition for writ of certiorari are governed by the Rules of the United States Supreme Court.

JUDGMENT

FILED: January 20, 2006

[ENTERED: JANUARY 20, 2006]

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 04-2369
CA-02-179

RIAZ BAQIR, M.D.

Plaintiff - Appellant

v.

ANTHONY J. PRINCIPI, Secretary, Department of Veterans Affairs

Defendant - Appellee

Appeal from the United States District Court for the Western District of North Carolina at Asheville

---

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court,
W.D. North Carolina.
Dr. Riaz **BAQIR**, M.D., Plaintiff,
v.
Anthony J. PRINCIPI, Secretary, Department of Veterans Affairs, Agency, Defendant.
No. Civ.1:02 CV 179.

Sept. 3, 2004.

John R. Sutton, Sr., April Burt Sutton, John R. Sutton, Jr., Candler, NC, for Plaintiff.
Paul B. Taylor, Asheville, NC, for Defendant.

MEMORANDUM AND ORDER

THORNBURG, J.

*1 THIS MATTER is before the Court on the Plaintiff's motion for relief from judgment or order and the Defendant's motion for summary judgment.

I. STATEMENT OF FACTS

Plaintiff Riaz Baqir, M.D., is a Muslim whose national origin is Pakistani. Complaint, ¶ 6. He is also Black and was born in 1946. *Id.*, ¶ ¶ 6-7.

On July 7, 1999, Plaintiff received an offer to practice "cardiovascular medicine" at the Department of Veterans Affairs Medical Center in Asheville, North Carolina ("Asheville VA").

Plaintiff's Deposition Exhibit 10 *attached to* Deposition of Arnold Brown, M.D., *attached as* Plaintiff's Exhibit 4, *to* Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, filed April 29, 2004 ("Plaintiff's Brief"). Plaintiff states that he was hired to be an "Interventional Cardiologist." Complaint, ¶ 9. However, Plaintiff also states that he never knew that he was to be the only interventional cardiologist on staff and that he never claimed to have served "independently" as an interventional cardiologist. Plaintiff's Exhibit 1, Affidavit of Riaz Baqir, M.D., Opposing Summary Judgment, *attached to* Plaintiff's Brief. Plaintiff accepted the job offer and began working for the Asheville VA on July 18 or 19, 1999. Complaint, ¶ ¶ 5, 14.

On July 15, 1999, the Physician Professional Standards Board Medical Staff Executive Council ("Standards Board") of the Asheville VA met and considered what privileges to grant Plaintiff. They noted that Plaintiff had been named in a malpractice suit and that a former colleague had rated Plaintiff's practice abilities as "average" and refused to sign a peer review approval form because the number of procedures Plaintiff claimed to have performed "appeared grossly exaggerated." Plaintiff's Deposition Exhibit 15, Standards Board Minutes dated July 15, 1999, *attached to* Brown Deposition; *see also,* Government Deposition Exhibit 2, Plaintiff's Peer Review by Dr. Michael O'Reilly, *attached to* Deposition of Dr. Ramesh Shah *attached as* Plaintiff's Exhibit 5 *to* Plaintiff's Brief.[FN1] The Standards Board recommended that Plaintiff be granted privileges in "general, diagnostic cardiology"

but not in interventional cardiology. Plaintiff's Deposition Exhibit 15, *supra.*

> FN1. Plaintiff's contention that these minutes are not authentic has no evidentiary support. Plaintiff's Brief, at 3.

The Standards Board also discussed Plaintiff's proctoring. The Asheville VA requires all new employees to undergo a proctorship, which is "a probationary period" during which "their performance is evaluated and they can be terminated without all the formalities that a career employee beyond the probationary period is subject to." Brown Deposition, at 5-6. Dr. Brown, who was Chief of Staff at the Asheville VA through most of the relevant time period, further explained that a proctorship "is absolutely not an additional training period," "it's observation." *Id.,* at 6, 35. The Standards Board assigned Dr. Sundeep Mediratta at the Asheville VA to proctor Plaintiff in diagnostic cardiology. Plaintiff's Deposition Exhibit 15, *supra.* The Standards Board also decided that Dr. Lewis Elliston, who was the Director of the Medical Program Team, would try to make arrangements for Plaintiff to travel to a VA medical center in Durham, North Carolina, to be proctored in interventional cardiology procedures. *Id.; see also,* Defendant's Deposition Exhibit B, Memorandum of July 30 1999, *attached to* Brown Deposition.

*2 Over the next several months, Dr. Mediratta perceived many problems with Plaintiff's performance. Dr. Mediratta explained that Plaintiff accompanied him as an assistant "many times" and

that, at one point, he decided to permit Plaintiff to take the lead in a diagnostic catheterization. Plaintiff's Exhibit 7, Deposition of Sundeep Mediratta, M.D., *attached to* Plaintiff's Brief, at 29. [FN2] During this procedure, Dr. Mediratta observed that Plaintiff "could not get vascular access," "manipulate the manifold," or place the catheters properly. *Id.* Dr. Mediratta stated that it was "glaringly obvious within the first week or two, ... that he did not know exactly what he was doing." *Id.*, at 40. Dr. Mediratta relayed his conclusions about Plaintiff's inability to perform the operation to Dr. Elliston, and they decided not to allow Plaintiff to perform any more procedures until he returned from the Durham VA facility. *Id.*, at 31, 40-41.

> FN2. In a somewhat contradictory statement, Dr. Mediratta stated that he and the Plaintiff did not work together on many procedures. Mediratta Deposition, at 12.

Dr. Mediratta's concerns over Plaintiff's competency were not limited to what he observed during the diagnostic catheterization. He noted that, when Plaintiff would monitor patients on weekends, he would not adjust their medication doses as the circumstances required. *Id.*, at 62-66. Dr. Mediratta relayed this concern to Dr. Elliston. *Id.*, at 66. Furthermore, Dr. Mediratta stated that Plaintiff failed to make "critical appraisal[s]" of ultrasounds, failed to diagnose irregularities that appeared on reports from Holter monitors, and had some minor difficulties reading EKG's. *Id* ., at 68-69. Dr. Mediratta summarized Plaintiff's performance by stating

> Dr. Baqir had very limited clinical skills and he had a hard time taking care of cardiac patients.... We would round every day in the morning together as a team, all the cardiologists and [physicians' assistants], and go over each and every patient. There were some patients that were assigned to Dr. Baqir as his primary responsibility.... Dr. Baqir could not make any clinical decisions on them.... I did not think he had the clinical skills to make tough clinical decisions by himself.

Id., at 67-68.

On July 23, 1999, Dr. Elliston wrote Dr. Kenneth Morris at the Durham VA and asked for "an independent assessment by you of Dr. Baqir's interventional cath skills and any pertinent observations." Plaintiff's Deposition Exhibit 12, *attached to* Brown Deposition. Dr. Elliston also wrote that "[d]uring our initial assessment of this practitioner he appeared to show signs of excessive insecurity in his procedures and techniques." *Id.* In early October 1999, Plaintiff did, in fact, go to the Durham VA to be evaluated. Plaintiff's Deposition Exhibit 14, Standards Board Minutes dated September 30, 1999, *attached to* Brown Deposition. The trip to Durham was necessary because there was no interventional cardiologist at the Asheville VA. Plaintiff's Exhibit 3, Testimony of Dr. Lewis Elliston before the Equal Employment Opportunity Commission, *attached to* Plaintiff's Brief, at 13.

*3 On October 20, 1999, Dr. Morris sent a memorandum to the Chief of Staff at the Asheville VA explaining that the unanimous conclusion of the doctors at the Durham VA who had observed the Plaintiff was that Plaintiff was not "ready to perform all the duties of an interventional cardiologist." Defendant's Deposition Exhibit C, *attached to* Brown Deposition. Dr. Morris further stated that Plaintiff "likely can perform diagnostic catheterization in an adequate fashion although we concentrated on his interventional skills while he was with us and our observations in this area may not be adequate." *Id.* In his subsequent deposition, Dr. Morris stated that "Dr. Baqir's apparent familiarity with the tools was more that at the level of a beginning fellow than a completing fellow." Defendant's Exhibit 2, Deposition of Kenneth G. Morris, M.D., *attached to* Defendant's Brief in Support of Summary Judgment, filed March 31, 2004, at 58.

On October 21, 1999, Dr. Mitchell Krucoff, of the Durham VA, e-mailed Dr. Morris expressing his opinion that "[i]n working with [Plaintiff] on interventional cases it is clear to me that Dr. Baquir [sic] does not have sufficient grasp of the selection, set up or application of basic interventional devices to operate independently as an interventional attending." Defendant's Exhibit 10, Krucoff e-mail dated October 21, 1999, *attached to* Defendant's Brief.

On October 29, 1999, Dr. Mediratta sent a letter to the Chief of Medicine at the Asheville VA stating that the Plaintiff "cannot perform [a diagnostic procedure] independently and needs to be supervised

or receive further training." Letter from Dr. Mediratta to Chief of Medicine, *contained in* Defendant's Exhibit 12, *attached to* Defendant's Brief.

Plaintiff claims that the critical statements mentioned above are "false statements made by non-minority VAMC officials." Complaint, ¶ 25. He claims that, during his time at the Durham VA, he was actually "complimented for his skills in interventional cardiology and received no criticisms or complaints from the designated proctoring officials." *Id.*, ¶ 24. Plaintiff further claims that he only participated in seven procedures while at the Durham VA facility and that "seven procedures is a grossly inadequate number of procedures to base any competent analysis of one's skills." Plaintiff's Affidavit, ¶ 15.

Plaintiff also points out that Dr. Mediratta is of Indian descent, practices the Hindu religion, and is younger than the Plaintiff. Complaint, ¶ 15. Dr. Mediratta confirms these statements and admits that he knew that the Plaintiff was a Muslim. Mediratta Deposition, at 4-5, 76-77. Plaintiff further claims that Dr. Mediratta, as well as other Asheville VA employees, were hostile toward him from the time he began work there. The actions that he considers hostile include being denied privileges in interventional cardiology, one doctor's statement that Plaintiff should not "talk to" him but should report only to Dr. Mediratta, being sent to the Durham VA facility, and Dr. Mediratta's lack of communication with Plaintiff. Defendant's Exhibit 3, Deposition of Dr. Riaz Baqir, *attached to* Defendant's

Brief, at 88, 90, 92. Also, Plaintiff claims that Dr. Mediratta became agitated with him during one procedure and left the catheterization lab. Plaintiff's Affidavit, ¶ 11.

*4 On November 4, 1999, Plaintiff wrote Drs. Brown and Elliston taking issue with some of the reports from the doctors at the Durham VA and asking that he be allowed to work in the catheterization lab with a visiting interventional cardiologist "until such time that [he] can be considered as completed [his] proctorship successfully." Letter from Plaintiff to Dr. Brown, dated November 4, 1999, *contained in* Defendant's Exhibit 12, *attached to* Defendant's Brief. Plaintiff also requested a copy of his credentials file. Letter from Plaintiff to Dr. Brown, dated November 4, 1999; Standards Board Minutes from November 5, 1999, *contained in* Defendant's Exhibit 12, *attached to* Defendant's Brief.

The next day the Standards Board met. After considering the opinions of the doctors at the Durham VA, Dr. Mediratta's opinion, and the Plaintiff's letter to Drs. Brown and Elliston, the Standards Board unanimously agreed to recommend the denial of clinical privileges to Plaintiff in interventional cardiology and to recommend that the action be "reported to the National Practitioner Data Bank as required by VHA regulations." Standards Board Minutes dated November 5, 1999, *supra.* Dr. James Martin, who was Acting Chief of Staff at the Asheville VA at that time, stated that the Standards Board made its recommendation to him and then made a further recommendation to the Asheville VA Director, "both of whom have independent authority

and discretion to accept, decline, or modify recommendations of the [Standards] Board." Defendant's Exhibit 15, Affidavit of James W. Martin, DDS, *attached to* Defendant's Brief, ¶ 4.

On November 12, 1999, Dr. Elliston advised the Plaintiff that he would be terminated "due to Plaintiff's advanced age." Complaint, ¶ 29. Plaintiff's wife, who was also a doctor at the Asheville VA, states that Dr. Elliston told her that "interventional cardiology is for people in the thirties." Plaintiff's Exhibit 2, Affidavit of Marriyam Moten, M.D. Opposing Summary Judgment, *attached to* Plaintiff's Brief, ¶ 5. Dr. Elliston admits that he told Plaintiff that interventional cardiology "was a young man's sport." Elliston Testimony, *supra,* at 24-25. Dr. Elliston further stated that he blamed Plaintiff's termination on his age because he "was trying to be kind to him." *Id.,* at 24.

On November 15, 1999, James Christian, Asheville VA Director, gave Plaintiff a memorandum informing him that his employment would end on December 3, 1999, "because [he was] not granted the privileges necessary to fulfill the requirements of the position for which [he was] hired" due to the Standards Board and Executive Council's determination that he did "not have the requisite skills ... to function independently as an interventional cardiologist at this medical center." Exhibit B, *attached to* Defendant's Exhibit 1, Affidavit of James Christian, *attached to* Defendant's Brief. Christian's affidavit states that he had the sole authority to hire and fire Baqir but that, in making his decision to terminate the Plaintiff, he

took into account the Standards Board's opinion, the proctoring reports of Drs. Mediratta and Morris, his own review of Plaintiff's file, the needs of the Asheville VA, and the fact that there was no interventional cardiology training program at the Asheville VA. Christian Affidavit, ¶ ¶ 3, 5.

*5 On December 11, 1999, Plaintiff filed a complaint with the EEOC "based on discrimination, wrongful termination, and retaliation." Complaint, ¶ 31. He initially contacted the EEOC on November 1, 1999. Defendant's Exhibit 20, *attached to* Defendant's Brief. Plaintiff alleges that, after he filed his EEOC complaint, Asheville VA officials "refused to pay the bill for the storage of Plaintiff's personal belongings, causing the Plaintiff's personal belongings to be impounded," filed a notice of indebtedness claiming that the Plaintiff owed the U.S. government in excess of $20,000, and entered negative information about Plaintiff into the National Practitioner Data Bank. Complaint, ¶ ¶ 32, 34, 35.

Djuna Roberts, Chief Acquisitions and Logistics Officer for the Asheville VA, states that, although she was not working at the Asheville VA at the time these events occurred, she has reviewed Plaintiff's file. Defendant's Exhibit 18, Affidavit of Djuna Roberts, *attached to* Defendant's Brief, ¶ ¶ 2-3. Attached to her affidavit is a copy of the Federal Travel Regulations which state that "the time allowable for temporary storage in connection with the shipment of household goods shall not exceed a period of 90 days." Exhibit A, *attached to* Roberts

Affidavit. According to Roberts, Plaintiff never applied for an extension of this 90-day period and no such extension was granted. *Id.*, ¶ 5.

Vernon Lane, Chief of the Accounting Section of the Business Office of the Asheville VA, states that he interpreted Plaintiff's "Special Pay Agreement" to require Plaintiff to refund a portion of his salary if his employment ended prematurely. Defendant's Exhibit 19, Affidavit of Vernon Lane, *attached to* Defendant's Brief, ¶ ¶ 2, 5. The Special Pay Agreement stated that "in the event [Plaintiff] voluntarily or because of misconduct [fails] to complete any of the year(s) of service ... which entitles [Plaintiff] to receive Special Pay ... [Plaintiff] will refund the specified percentage." Exhibit A, Special Pay Agreement, *attached to* Lane Affidavit. Lane further states that when he sent the notice to Plaintiff on December 22, 1999, asking him to return part of his salary, he did not know that Plaintiff had asserted any rights under anti-discrimination laws. Lane Affidavit, ¶ 6.

Plaintiff claims that in November 2000, the Asheville VA filled his position with a similarly qualified and younger doctor of Indian descent. Complaint, ¶ ¶ 46. Plaintiff received a right-to-sue letter from the EEOC on or about April 30, 2002. *Id.*, ¶ 48.

II. PROCEDURAL HISTORY

Plaintiff filed his complaint on July 29, 2002, alleging eight counts. On September 11, 2003, the Magistrate Judge dismissed four of Plaintiff's

counts. Plaintiff's surviving claims are for discrimination on the basis of race, color, national origin, and religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000 to 2000e-17, discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § § 621 to 634 *et seq.*, a hostile work environment, and retaliation/reprisal.

***6** Defendant filed a motion for summary judgment on March 31, 2004. When Plaintiff had not responded by April 21, 2004, the Court entered summary judgment in favor of the Defendants and dismissed the case with prejudice. *See* Judgment, filed April 21, 2004. Plaintiff has moved for relief from that Judgment.

III. DISCUSSION

A. Motion for relief from judgment or order.

1. Standard of review.

Rule 60(b) of the Federal Rules of Civil Procedure provides that "[o]n motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for ... mistake, inadvertence, ... or excusable neglect." The Fourth Circuit has held that ruling on motions brought under this rule is "vested in the sound discretion of the trial court." *Croomer v. Croomer*, 217 F.3d 838 (table), 2000 WL 1005211, ----3 (4th Cir.2000).

2. Disposition.

Plaintiff's counsel has stated that he was "not immediately aware of the local federal rule requiring a response to Defendant's motion within 14 days, and in good faith believed a 30 day response period was appropriate." Plaintiff's Motion for Relief from Judgment or Order, filed April 22, 2004, ¶ 4. He argues that "such ignorance of the local rule constitutes excusable neglect." *Id.*, ¶ 5. The Fourth Circuit has noted that "where default judgments are at issue, ... this court has taken an increasingly liberal view of Rule 60(b)." *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 810 (4th Cir.1988). In general, "[w]hen the party is blameless and the attorney is at fault," courts will consider the attorney's conduct to be excusable neglect and will grant a Rule 60(b) motion. *Id.*, at 811. Therefore, this Court will allow the Plaintiff's motion, vacate the Court's Judgment of April 21, 2004, and consider Defendant's summary judgment motion on the merits.

B. Motion for summary judgment.

1. Standard of review.

Summary judgment is appropriate when there is no genuine issue of material fact and judgment for the moving party is warranted as a matter of law. Fed.R.Civ.P. 56(c). A genuine issue exists if a reasonable jury considering the evidence could return a verdict for the nonmoving party, here the Plaintiff. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). By reviewing substantive law, the Court may determine what matters constitute material facts. *Anderson, supra.* "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Id.* The Defendant, as the moving party, has the initial burden to show a lack of evidence to support the Plaintiff's case. *Shaw, supra,* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If that showing is made, the burden then shifts to the Plaintiff who must convince the Court that a triable issue does exist. *Id.* A "mere scintilla of evidence" is not sufficient to defeat summary judgment. *Id.* Moreover, in considering the facts of the case for purposes of this motion, the Court will view the pleadings and material presented in the light most favorable to the Plaintiff, as the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

2. Discrimination claims.

a. Methods of proof for discrimination claims.

*7 To establish illegal discrimination, an employee may use "ordinary principles of proof using any direct or indirect evidence relevant to and sufficiently probative of the issue." *Tuck v. Henkel Corp.*, 973 F.2d 371, 375 (4th Cir.1992), *abrogated on other grounds, Deniro v. Asplundh Tree Expert Co.*, 92 F.2d 1177 (table), 1996 WL 423125, ----3 n. 1 (4th Cir.1996), and in *O'Connor v. Consolidated Caterers*

Corp., 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). To overcome a motion for summary judgment using this method of proof, Plaintiff must provide direct or circumstantial evidence "of sufficient probative force" to show a genuine issue of material fact. *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir.1988).

But plaintiffs attempting to prove illegal discrimination may also rely on the burden-shifting framework explained in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Although the Supreme Court originally designed this framework for Title VII cases, the Fourth Circuit has applied it to ADEA cases as well. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir.2004). Under this framework, the Plaintiff must first forecast evidence that "(1) [he] is a member of a protected class; (2)[he] suffered adverse employment action; (3)[he] was performing [his] job duties at a level that met [his] employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class." *Hill, supra.* If the Plaintiff can make this prima facie case, "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id.* If the employer meets this burden of production, "the *McDonnell Douglas* framework ... disappears[s], and the sole remaining issue [is] discrimination *vel non*." *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 153 (2000)). In other words, "the burden to demonstrate pretext 'merges with the ultimate burden of

persuading the court that [the Plaintiff] has been the victim of intentional discrimination." ' *Id.* (quoting *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

b. *McDonnell-Douglas* scheme.

Plaintiff may not rely on the *McDonnell-Douglas* burden-shifting scheme of proof to survive this motion for summary judgment because he cannot satisfy the third element of the prima facie case. To make a prima facie case of discrimination using this scheme of proof, Plaintiff must forecast evidence that he was meeting his "employer's legitimate expectations at the time of the adverse employment action." *Hill, supra.* The unanimous conclusion of the doctors who observed the Plaintiff's practice was that he was incapable of serving as an interventional cardiologist. *See, e.g.,* Mediratta Deposition, at 29, 40, 62-69; Morris Deposition, 58; Krucoff e-mail; Letter from Dr. Mediratta to Chief of Medicine *contained in* Defendant's Exhibit 12. He admits that he was hired to be an interventional cardiologist. Complaint, ¶ ¶ 11-13. Therefore, Plaintiff was not meeting his employer's expectations at the time of his termination, and he cannot make a prima facie case under Title VII or the ADEA.

c. Ordinary principles of proof.

***8** The record is completely devoid of material that could be considered direct or circumstantial evidence of discrimination on the basis of race, color, religion, or national origin. Having failed to satisfy either

scheme of proof, Plaintiff's claims of discrimination on those bases will be dismissed.

Plaintiff's claim of age discrimination presents a more challenging question. Plaintiff claims that Dr. Elliston, who was a member of the Standards Board that recommended Plaintiff be denied interventional cardiology privileges, told him that he was fired because of his advanced age. Defendant's Brief, at 16; Complaint, ¶ 29, Plaintiff's Affidavit, ¶ 23. Plaintiff's wife claims that Dr. Elliston told her that "age is the major and only factor." Moten Affidavit, ¶ 5. Dr. Elliston admits to telling the Plaintiff and/or his wife that he should not pursue interventional cardiology because "it was a young man's sport." Elliston Testimony, at 24-25.

The Fourth Circuit has indicated that an ADEA plaintiff must show "that age was a substantial motivating factor in the terminating decision." *Mereish v. Walker*, 359 F.3d 330, 339-40 (4th Cir.2004). Of course, for age to be a "substantial motivating factor in the terminating decision," the person actually making that decision must consider the plaintiff's age. The Fourth Circuit has stated that "the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer ... so long as the plaintiff presents sufficient evidence to establish that the subordinate [who harbored the animus] was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." *Hill*, 354 F.3d at 288-89. The Court further stated that "an employer will be liable not for the improperly motivated person who merely influences the

decision, but for the person who in reality makes the decision." *Id.*, at 291.

In the present case, it is undisputed that neither Dr. Elliston nor the Standards Board had the final authority to terminate the Plaintiff. Dr. James Martin, who was Chief of Staff at the Asheville VA during the relevant period, and Dr. Jung Noh, also a member of the Standards Board during the relevant period, state that both the Chief of Staff and the Asheville VA Director had the "independent authority and discretion to accept, decline, or modify recommendations of the Board." Martin Affidavit, ¶ 4; Defendant's Exhibit 16, Affidavit of Jung K. Noh, *attached to* Defendant's Brief, ¶ 4. James Christian, who was Medical Center Director during the relevant period, avers that he had the sole authority to terminate Plaintiff. Christian Affidavit, ¶ 3. Therefore, even assuming that Dr. Elliston spoke for the entire Standards Board when he stated that it had recommended denial of Plaintiff's privileges because of his age, this fact is of no consequence as long as the final decisionmaker did not simply "rubber stamp" the Standards Board's opinion. *See Hill, supra,* at 289. Christian's uncontradicted statement is that he fired Plaintiff after considering the Standards Board's recommendation along with two proctoring reports, the needs and limitations of the Asheville VA, and Plaintiff's complete file. Christian Affidavit, ¶ ¶ 4, 5. Therefore, neither Dr. Elliston nor the Standards Board may "be viewed as the one principally responsible for the decision." And since there is no evidence that the final decisionmaker was illegally influenced, summary judgment is appropriate.

***9** Plaintiff argues that the Asheville VA deviated from their normal practices by allowing him to participate in too few procedures during his proctorship. However, Plaintiff forecasts no evidence to support this claim. Dr. Brown stated that there is no predetermined number of procedures that a doctor must participate in during a proctorship but that they participate in enough procedures to allow the proctor to make an informed decision. *See* Brown Deposition, at 23. In this case, Dr. Mediratta testified that Plaintiff's incompetence was "glaringly obvious," along with Dr. Krucoff who testified that, "No, this was not subtle. I mean he was clearly not ready to be an independent operator." Mediratta Deposition, at 29; Defendant's Exhibit 11, Deposition of Mitchell W. Krucoff, MD, *attached to* Defendant's Brief, at 27. Plaintiff's claim that other doctors have been allowed to participate in more procedures during proctorship is irrelevant in light of the fact that Plaintiff's evaluators felt that they had seen enough. *See* *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir.1998) ("[i]t is the perception of the decision maker which is relevant").

Alternatively, though this fact may not be dispositive, the Court considers it important that the Plaintiff was fired so shortly after being hired. Absent some evidence that a different person was responsible for each act, it defies common sense to conclude that the firing was based on discriminatory animus. The Fourth Circuit has stated that "employers who knowingly hire workers within a protected group seldom will be credible targets for pretextual firings [shortly after a hiring]." *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir.1991). Plaintiff

offers no rebuttal to the obvious inference that an employer who hires an employee in a protected class will not immediately fire him based on his membership in that class.

3. Hostile work environment.

To avoid summary judgment on a hostile work environment claim, Plaintiff must forecast evidence that: "(1) [he] experienced unwelcome harassment; (2) the harassment was based on [a protected trait]; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." *Bass v. E.I. Dupont De Nemours & Co.*, 324 F.3d 761, 765 (4th Cir.), *cert. denied*, 540 U.S. 940, 124 S.Ct. 301, 157 L.Ed.2d 253 (2003). To support this hostile work environment claim, Plaintiff states that he was never granted privileges in interventional cardiology, that one doctor told him not to "talk to" him but to report only to Dr. Mediratta, that he was sent to the Durham VA for evaluation, that Dr. Mediratta refused to communicate with him, that Dr. Mediratta became agitated with him during one procedure and left the catheterization lab, and that several doctors made false statements about his medical skills. Plaintiff's Deposition, at 88, 90, 92; Plaintiff's Affidavit, ¶ 11; Complaint, ¶ ¶ 55-56. Plaintiff forecasts no evidence that the doctors' evaluations of his medical skills were false or that the decision not to grant him interventional cardiology privileges was motivated by anything other than a healthy concern for the safety of patients. Plaintiff's allegations that one doctor told

him not to speak to him, that Dr. Mediratta did not communicate with him, and that Dr. Mediratta became agitated on one occasion are not facts that describe an "abusive" environment. Furthermore, Plaintiff forecasts no evidence that any of this alleged "harassment" was based upon a protected trait. Therefore, the Court will grant summary judgment as to this hostile work environment claim.

4. Retaliation.

*10 Plaintiff claims that Defendant retaliated against him for asserting his rights under anti-discrimination laws by terminating his employment, impounding his personal belongings, causing a notice of indebtedness to be issued against him, and entering negative information about him into the National Practitioner Data Bank. Complaint, ¶ 59. To make a prima facie case of retaliation, Plaintiff must forecast evidence that "(1) [he] engaged in a protected activity, such as filing a complaint with the EEOC; (2) the employer acted adversely against [him]; and (3) the protected activity was causally connected to the employer's adverse action." *Beall v. Abbott Labs.*, 130 F.3d 614, 619 (4th Cir.1997). If Plaintiff forecasts such evidence, "the burden is on the employer to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions." *Id.* If the employer is successful in producing such evidence, the burden shifts back to the Plaintiff to forecast evidence that the employer's stated reason for the action was pretextual. *Price v. Thompson*, 380 F.3d 209, 2004 WL 1838183, ----3 (4th Cir.2004).[FN3]

> FN3. There appears to be some uncertainty as to whether a plaintiff may survive a motion for summary judgment solely by forecasting evidence that the employer's stated reason for the adverse action was pretextual or whether the plaintiff must also forecast evidence that retaliation was the true reason for the adverse action. *See Price, supra.* This Court will assume without deciding that a plaintiff may avoid summary judgment merely by forecasting evidence that the employer's stated reason for the adverse action was pretextual.

Here, it is undisputed that Plaintiff engaged in protected activity and that Defendant took an adverse employment action against him. It is far less clear that there was any causal connection between the two. Indeed, Plaintiff did not even file his EEOC complaint until after he had been terminated and the Standards Board had recommended that the denial of privileges be reported to the data bank. There does not appear to be any evidence that either the Standards Board, Christian, or any other relevant party knew that Plaintiff had contacted the EEOC on November 1, 1999. Even if a relevant decisionmaker did know of Plaintiff's contact, there is no evidence that anyone acted on that knowledge. However, since it is unclear exactly when some of the relevant events occurred, and since "a causal connection ... exists where the employer takes adverse employment action against an employee shortly after learning of the protected activity," the Court will assume that Plaintiff has stated a prima facie case. *Id.*, at ----2.

The burden then shifts to Defendant to state non-retaliatory reasons for the adverse actions. Defendant has produced much evidence that it terminated Plaintiff because of his inability to perform interventional cardiology procedures and other deficiencies with his practice of medicine. Defendant has submitted a federal travel regulation which provides a non-retaliatory reason for ceasing to store Plaintiff's belongings. Exhibit A, *attached to* Roberts Affidavit. Defendant has further produced an affidavit and a document signed by Plaintiff showing that Plaintiff would be required to refund a portion of his salary "in the event [he] voluntarily or because of misconduct [fails] to complete any of the year(s) of service ... which entitles [him] to receive Special Pay." Exhibit A, *attached to* Lane Affidavit; Lane Affidavit. Finally, Defendant has submitted a document which indicates that the Asheville VA's attorney interpreted applicable federal regulations to require the Asheville VA to report its actions regarding Plaintiff to the National Practitioners Data Bank. Report of Contact, *attached to* Defendant's Exhibit 13, Deposition of Margaret Villalpando, *attached to* Defendant's Brief. Notably, this document is dated November 18, 1999, which is almost one month before Plaintiff filed an EEOC complaint. Other than challenging the attorney's interpretation of the regulations on making reports to the data bank, Plaintiff makes no attempt to show that any of Defendant's stated reasons for its actions were pretextual. Therefore, summary judgment is appropriate.

IV. ORDER

*11 IT IS, THEREFORE, ORDERED that the Plaintiff's motion for relief from judgment or order is hereby GRANTED, and the Court's Judgment filed April 21, 2004, is hereby VACATED.

IT IS FURTHER ORDERED that the Defendant's motion for summary judgment is hereby GRANTED; a Judgment dismissing this action is filed herewith.

JUDGMENT

For the reasons set forth in the Memorandum and Order filed herewith,

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Defendant's motion for summary judgment is ALLOWED, and this matter is hereby DISMISSED WITH PREJUDICE in its entirety.

* * MAILING CERTIFICATE OF CLERK * *

True and correct copies of the attached were mailed by the clerk to the following:
Paul B. Taylor, Esq.
United States Attorney
Room 233, U.S. Courthouse
100 Otis Street
Asheville, NC 28801
John R. Sutton Jr., Esq.
Sutton & Edmonds
P.O. Box 145
Candler, NC 28715

April Burt Sutton, Esq.
Sutton & Edmonds
P.O. Box 145
Candler, NC 28715
John R. Sutton Sr., Esq.
Sutton & Edmonds
P.O. Box 145
Candler, NC 28715

cc:

Judge
Magistrate Judge
U.S. Marshal
Probation
U.S. Attorney
Atty. for Deft.
Defendant
Warden
Bureau of Prisons
Court Reporter
Courtroom Deputy
Orig-Security
Bankruptcy Clerk's Ofc.
Other_____

W.D.N.C.,2004.
Baqir v. Principi
Not Reported in F.Supp.2d, 2004 WL 3314942 (W.D.N.C.)

Briefs and Other Related Documents (Back to top)

• 2004 WL 1960975 (Trial Motion, Memorandum and Affidavit) Defendant's Reply Brief (May 5, 2004)

- 2004 WL 1960976 (Trial Motion, Memorandum and Affidavit) Defendant's Response to Plaintiff's Motion for Relief from Judgment or Order (May 5, 2004)
- 2004 WL 1960972 (Trial Motion, Memorandum and Affidavit) Defendant's Brief in Support of Its Motion for Summary Judgment (Mar. 31, 2004)
- 2003 WL 23745355 (Trial Motion, Memorandum and Affidavit) Defendant's Reply to Plaintiff's Objection and Response to Defendant's Motion for a Protective Order (Dec. 23, 2003)
- 2003 WL 24228778 (Trial Motion, Memorandum and Affidavit) Response and Objection (Dec. 23, 2003)
- 2003 WL 23745351 (Trial Motion, Memorandum and Affidavit) Defendant's Reply Brief in Support of Its Partial Motion to Dismiss (Mar. 24, 2003)
- 2003 WL 23745346 (Trial Motion, Memorandum and Affidavit) Plaintiff's Response to Defendant's Partial Motion to Dismiss (Mar. 20, 2003)
- 2003 WL 23745343 (Trial Motion, Memorandum and Affidavit) Defendant's Brief in Support of Its Partial Motion to Dismiss (Jan. 29, 2003)
- 2002 WL 32642574 (Trial Pleading) Answer (Oct. 31, 2002)
- 1:02CV00179 (Docket) (Jul. 29, 2002)

END OF DOCUMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 20, 2006

[ENTERED: MARCH 20, 2006]

No. 04-2369
CA-02-179

RIAZ BAQIR, M.D.

Plaintiff - Appellant

v.

ANTHONY J. PRINCIPI, Secretary, Department of Veterans Affairs

Defendant - Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge King, Judge Gregory, and Judge Harwell.

For the Court,

/s/ Patricia S. Connor

CLERK

Supreme Court, U.S.
FILED
OCT 20 2006
OFFICE OF THE CLERK

(2)

No. 05-1605

In the Supreme Court of the United States

RIAZ BAQIR, PETITIONER

v.

ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
TEAL LUTHY MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner failed to establish a prima facie case of employment discrimination under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because he failed to establish that he was performing the duties of an interventional cardiologist at a level that met the Veterans Administration's legitimate expectations at the time he was fired.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Cline v. *Catholic Diocese*, 206 F.3d 651 (6th Cir. 2000) .. 10
Freilich v. *Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002) 11
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 6, 7, 10
United States Postal Serv. Bd. of Governors v. *Aikens*, 460 U.S. 711 (1983) 9, 10

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 2
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 2

In the Supreme Court of the United States

No. 05-1605

RIAZ BAQIR, PETITIONER

v.

ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 434 F.3d 733. The opinion of the district court (Pet. App. 44-69) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42-43) was entered on January 20, 2006. A petition for rehearing was denied on March 20, 2006 (Pet. App. 70-71). The petition for writ of certiorari was filed on June 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1999, petitioner was offered a temporary term of employment as an interventional cardiologist at

the Asheville, North Carolina, Veterans Administration Medical Center (VAMC).[1] Pet. App. 4. Several months later, when he failed to complete the credentialing process and obtain the medical privileges that are required to practice in this speciality, he was fired.[2] *Id.* at 13-14. He brought suit against the Secretary of Veterans Affairs alleging that his firing violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 2. Petitioner's complaint alleges that he is black, that he is a practicing Muslim, that his national origin is Pakistani, and that he was 52 years old at the time of his firing. *Id.* at 3.

All new physicians at the Asheville VAMC are proctored by other physicians when they are hired, so that the hospital can be sure that they are qualified to treat patients.[3] Before petitioner began work, the Physician Professional Standards Board and Medical Staff Executive Council (the Board) of the Asheville VAMC met and decided that petitioner could be proctored in general diagnostic cardiology at the Asheville VAMC, but would have to be proctored in interventional cardiol-

---

[1] An interventional cardiologist is a physician who treats coronary artery blockages by inserting catheter wires into arteries leading to the coronary arteries and then treats the blockages with balloons, stents, or cutting devices. Pet. App. 3.

[2] The credentialing process is a review of relevant licenses, information on physical and mental health status, peer assessment of professional competence, continuing education records, and board certifications. Medical privileges are the authority to practice at the hospital in a particular field of medicine. Pet. App. 5 n.4.

[3] Proctoring is a process through which new physicians are observed to determine their competency before privileges are granted to perform medical procedures. Pet. App. 5 n.5.

ogy at the Durham, North Carolina VAMC, because there were no interventional cardiologists on staff at the Asheville facility. Pet. App. 5-6. At this same meeting, the Board noted some questions about petitioner's skills in interventional cardiology. In particular, although petitioner was recommended for a position in interventional cardiology by his superiors at a hospital in Pennsylvania where he did a one-year, unaccredited training program in interventional cardiology, one of his colleagues at a different hospital described his skills as average and refused to sign a peer appraisal form because he believed the form "grossly exaggerated" the number of procedures that petitioner had performed. *Id.* at 5.

Petitioner began work at the Asheville VAMC on July 18, 1999. Pet. App. 6. He alleges that he was subjected to a hostile work environment on his first day of work by a Hindu physician who told petitioner not to talk to him. *Id.* at 8. Several days later, Dr. Mediratta —Chief of Cardiology at the Asheville VAMC—allowed petitioner to take the lead on a diagnostic catheterization and concluded that petitioner "was not handling the catheters with confidence or accurately" and "did not know how to do the catheterization properly." *Ibid.* Dr. Mediratta informed Dr. Elliston, petitioner's direct supervisor, of his concern, and Dr. Elliston determined that petitioner should not be allowed to perform any additional catheterizations until he had been to the Durham VAMC for proctoring. *Ibid.*

Petitioner's proctoring period in interventional cardiology at the Durham VAMC took place over a several week period in October 1999. Petitioner participated in ten cases at the Durham VAMC. Pet. App. 10. The interventional cardiologists who proctored petitioner

there unanimously concluded that he was unqualified to independently perform interventional cardiology procedures. *Id.* at 11. One of the proctoring physicians, Dr. Kenneth G. Morris, an Associate Professor of Medicine at the Duke University School of Medicine, prepared a memorandum to his Chief of Staff which explained that all of the proctoring physicians had concluded that petitioner did "not currently possess the expertise to be granted privileges" in interventional cardiology. *Ibid.* Another proctoring physician observed that petitioner did "not have [a] sufficient grasp of the selection, set up or application of basic interventional devices to operate independently as an interventional attending," and that "this was not even close" because he "simply was nowhere near ready to operate as an independent interventionalist." *Id.* at 11 n.8.

On November 4, 1999, petitioner reviewed his credentialing file. He contended in response to the proctoring reports that Dr. Morris had overstated the extent of the Durham VAMC's physicians' observations of his skills, and that the visit to Durham was insufficient to assess his interventional cardiology skills. Pet. App. 12. He requested to be permitted to work with a consulting interventional cardiologist "until such time that I can be considered as [having] completed my proctorship successfully." *Id.* at 12-13.

On November 5, 1999, the VAMC Board reviewed the proctoring reports as well as the position statement submitted by petitioner and petitioner's credentials. Pet. App. 13. After reviewing and discussing these materials, the Board observed that proctoring is "used to determine competence and is not a period of training" and that petitioner was hired "as a fully trained interventional cardiologist," not a trainee. *Ibid.* The Board

voted to recommend denial of clinical privileges in interventional cardiology and voted to recommend that this action be reported to the National Practitioner Data Bank as required by VA regulations. *Ibid.* Dr. Arnold Brown, the Chief of Staff for the Asheville VAMC, advanced the Board's recommendation to James Christian, the Medical Center Director, who reviewed and approved it. *Ibid.*

Because petitioner was hired by the Asheville VAMC to be an interventional cardiologist, and because he was not granted privileges in that discipline, Christian then terminated petitioner's temporary employment. Pet. App. 14. Christian informed petitioner of his termination by letter, stating that petitioner was terminated because he was not granted the privileges necessary to fulfill the requirements of the position for which he was hired. *Ibid.*

Petitioner's wife (then Chief of Cardiology at the Wilkes-Barre Veterans Center) spoke with Dr. Elliston after the November 5 Board meeting. Pet. App. 14. According to petitioner's wife, Elliston told her that petitioner's age was "the major and only factor" for petitioner's discharge. *Ibid.* Elliston denied stating that age was the only factor in petitioner's discharge. He conceded that he told petitioner's wife that interventional cardiology was "a young man's sport," but explained that he was attempting to recommend to petitioner, in a gentle manner, that he practice in another area of cardiology for which he possessed the required skills. *Ibid.*

2. On December 15, 1999, petitioner filed an administrative complaint with the VA's Office of Resolution Management alleging discrimination. Pet. App. 15. In July 2002, having exhausted his administrative reme-

dies, petitioner brought suit against the VA. *Id.* at 17 n. 11. As relevant here, petitioner alleged that the VA terminated his employment based on race, color, religion, and national origin, in violation of Title VII; terminated his employment based on his age, in violation of the ADEA; subjected him to a hostile work environment; and retaliated against him for contacting an equal employment opportunity counselor. *Id.* at 17.

After discovery, the VA moved for summary judgment on petitioner's claims. Pet. App. 17. The district court granted summary judgment to the VA on all of petitioner's claims. *Id.* at 67. As relevant here, the district court concluded that petitioner had not raised a material dispute of fact on the question whether he could satisfy the second part of the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), by demonstrating that he had met the VA's legitimate expectations at the time he was fired. Pet. App. 59. The court also concluded that petitioner failed to create a material dispute of fact as to whether his proctoring period was too short, because the VA produced evidence that the proctoring period lasts only as long as required to determine a physician's competence, and petitioner's evidence that other doctors had been given longer proctoring periods did not create a dispute of fact on this point. *Id.* at 62.

3. The United States Court of Appeals for the Fourth Circuit affirmed. Pet. App. 33. The court of appeals agreed with the district court that petitioner failed to establish that he was performing his job duties at a level that met the VA's legitimate expectations. *Id.* at 23. The court explained that petitioner was hired to serve as an interventional cardiologist, and the undisputed evidence showed that he was unable to meet the

VA's expectations for that position.[4] *Id.* at 20-23. The court rejected petitioner's contentions that he should have been given a longer proctorship in interventional cardiology and that the Durham proctors were discouraged from extending his proctorship by the prospect of having to travel to Asheville, concluding that petitioner failed to produce any evidence that a proctorship is intended as a training period as opposed to an assessment period that lasts only as long as is required to assess the skills of the proctored physician. *Id.* at 22-23.[5]

ARGUMENT

The court of appeals' decision involves the fact-bound application of settled law and is correct. The decision does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is not warranted.

1. The court of appeals correctly applied the settled framework for assessing employment discrimination claims established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, petitioner has the initial burden of establishing a prima facie case of discrimination by showing that: (1) he is a

---

[4] The court explained that petitioner's contentions about his performance at Asheville could not show he was qualified to serve as an interventional cardiologist because the proctorship at Asheville was in general, diagnostic cardiology, not interventional cardiology. Pet. App. 23. Although petitioner's statement of the case discusses the proctorship in Asheville, he has not challenged the court of appeals' conclusion in this regard.

[5] The court of appeals also affirmed the district court's grant of summary judgment as to petitioner's claims for age discrimination, hostile work environment, and retaliation. See Pet. App. 27-32. The petition for a writ of certiorari does not seek review of those rulings.

member of a protected group; (2) he was meeting the VA's legitimate expectations; (3) he was discharged; and (4) the discharge occurred in circumstances that give rise to an inference of unlawful discrimination. As the court of appeals concluded, petitioner failed to establish a prima facie case of discrimination because he failed to show that he was meeting the VA's legitimate expectations for an interventional cardiologist. Pet. App. 20.

a. The undisputed evidence showed that the VA hired petitioner to be an interventional cardiologist who could "work independently and without further training." Pet. App. 20. The evidence also showed that petitioner was not able to demonstrate to the VA physicians assigned to proctor him in interventional cardiology that he could work independently as an interventional cardiologist. *Id.* at 20-21. The unanimous view of the three highly qualified physicians from the Durham VAMC who were asked to evaluate petitioner's skills was that he was not able to perform the job. *Id.* at 20. As the court of appeals concluded, because the only evidence in the record as to whether petitioner was able to meet the VA's expectations is that he could not do so, petitioner failed to satisfy this part of his burden of establishing a prima facie case of discrimination.

Petitioner contends (Pet. 11-15) that it was improper for the court of appeals to consider the evidence that the proctoring physicians concluded that he was not qualified to work independently as an interventional cardiologist during its analysis of his prima facie case, and that it should have reserved consideration of that evidence for the question whether the VA had a nondiscriminatory reason for firing him. According to petitioner, the court of appeals erred because the evidence that petitioner was incompetent "became entangled" with the

question whether petitioner made out a prima facie case of discrimination. Pet. 12. But, as the court of appeals explained, that evidence was relevant to its analysis of the prima facie case because petitioner failed to produce any evidence that he was satisfying the VA's legitimate expectations. Pet. App. 22-23.

Petitioner contended below that his experience, training, and recommendations were sufficient to show that he was meeting the VA's legitimate expectations. Pet. App. 21-22. But the question is not whether petitioner's qualifications, training, and experience *should* have prepared him to work independently as an interventional cardiologist, but rather whether they *did* actually do so. In other words, the prima facie case requires the court to assess not whether petitioner should have been able to meet the VA's legitimate expectations, but whether he was actually doing so. *Id.* at 22. Even if petitioner's evidence of his training and experience suggested he should have been able to work independently as an interventional cardiologist, it did not satisfy his burden of showing that he was meeting the VA's legitimate expectations. The court of appeals thus properly concluded that the undisputed evidence that the proctoring physicians had determined that petitioner lacked the skills to perform independently as an interventional cardiologist—because it was the only evidence on the question whether he was meeting the VA's legitimate expectations—was relevant to (and indeed determinative of) that question.[6]

---

[6] Petitioner's suggestion (Pet. 14) that the court of appeals' decision is in tension with this Court's analysis in *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 717 (1983), is incorrect. While *Aikens* notes that the court of appeals "erroneously focused on the question of prima facie case rather than di-

b. Contrary to petitioner's suggestion (Pet. 12-13), the court of appeals' decision does not conflict with the decision in *Cline* v. *Catholic Diocese*, 206 F.3d 651 (6th Cir. 2000). *Cline* concerned a teacher at a Catholic school whose contract was not renewed after the school learned that she was pregnant. The teacher claimed that the school had engaged in illegal pregnancy discrimination, and the school claimed it had terminated her for engaging in premarital sex contrary to its religiously-motivated policy. The Sixth Circuit faulted the district court for "conflat[ing] the distinct stages of the *McDonnell Douglas* inquiry by using [the employer's] 'nondiscriminatory reason' as a predicate" for finding that the plaintiff failed to make out a prima facie case." *Id.* at 660. But unlike petitioner, the plaintiff in *Cline* produced evidence that she was meeting the school's legitimate expectations. The plaintiff's employer gave her a "glowing teacher performance evaluation" two months *after* it learned that she was pregnant, *id.* at 657, which the court of appeals concluded gave rise to a material dispute of fact as to whether the plaintiff was meeting the school's expectations.

In any case where the defendant's proffered nondiscriminatory reason for taking an adverse employment action has to do with job performance, there will be

---

rectly on the question of discrimination," *id.* at 717, the plaintiff in *Aikens* had made out a prima facie case by showing, *inter alia*, that he had been rated as an "outstanding supervisor," *id.* at 713 n.2. Because the plaintiff in *Aiken* was able to withstand summary judgment and the case went to trial, the question was whether the failure to promote him was discriminatory. Here, by contrast, petitioner did not present any evidence that he was performing his job in accordance with the VA's reasonable expectations and thus never got past the prima facie case.

some analytical overlap between the plaintiff's prima facie case and the defendant's nondiscriminatory reason for taking the adverse employment action. Petitioner's suggestion that *Cline* holds that this analytical overlap can be avoided is incorrect. *Cline* simply holds that, in a case where the plaintiff produces evidence that—if proven at trial—would show that the plaintiff was meeting the defendant's legitimate expectations, it is improper to conclude that the plaintiff failed to make out a prima facie case, and the court should go on to analyze the "ultimate question" of discrimination. 206 F.3d at 660. *Cline* does not concern a situation, like this case, in which the plaintiff has no evidence that he was satisfying his employer's legitimate expectations, and thus it does not conflict with the court of appeals' decision here.

2. Contrary to petitioner's suggestion (Pet. 15-16), the court of appeals did not conclude that hospital employers are exempt from civil liability if they claim that a discharged medical employee was incompetent. Rather, the court of appeals concluded that petitioner had failed to produce any evidence that he was able to perform the job of an interventional cardiologist to the VA's satisfaction. Pet. App. 20. While the court of appeals commented that it was not "inclined to impugn" the proctoring physician's assessment of petitioner's capabilities, *ibid.* (citing *Freilich* v. *Upper Chesapeake Health, Inc.*, 313 F.3d 205, 218 (4th Cir. 2002) (noting that hospitals have wide discretion to make decisions regarding medical staff)), it never suggested that the hospital's decision to fire him was unreviewable. In fact, the court of appeals thoroughly reviewed the evidence on whether petitioner was able to perform as an interventional cardiologist to the VA's satisfaction, and concluded that it was undisputed that he was unable to

do so. Because the undisputed evidence showed that the VA requires all new physicians to demonstrate their skills in a proctoring period, because the unanimous view of the proctoring physicians was that petitioner lacked the necessary skills to be an interventional cardiologist, and because petitioner failed to produce any evidence that contradicted the proctoring physicians' views, the decision of the court of appeals did not depend on deference to the hospital's judgment. The question whether an employer's determination of the competence of medical or academic professionals is entitled to deference is thus not presented by this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARLEIGH D. DOVER
TEAL LUTHY MILLER
Attorneys

OCTOBER 2006